DOCKET

No. 83-1452-CFX Title: R. Anthony Marrese and Michael R. Treister,
Status: GRANTED Petitioners
v.
American Academy of Orthopaedic Surgeons

Docketed:
March 2, 1984 Court: United States Court of Appeals
for the Seventh Circuit

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Entry	Date	Note	Proceedings and Orders
1	Mar 2 1984	G	Petition for writ of certiorari filed.
2	Mar 2 1984		Appendix of petitioner R. Anthony Marrese filed.
3	Apr 2 1984		Brief amicus curiae of Illinois, et al, filed.
4	Apr 4 1984		DISTRIBUTED. April 20, 1984
5	Apr 25 1984	F	Response requested.
6	May 25 1984		Brief of respondent Am. Academy of Orthopaedic Surgeons in opposition filed.
7	May 29 1984		REDISTRIBUTED. June 14, 1984
8	May 30 1984	R	Reply brief of petitioner R. Anthony Marrese filed.
10	Jun 15 1984		REDISTRIBUTED. June 21, 1984
11	Jun 25 1984		The petition for a writ of certiorari is granted limited to Questions 1, 2 and 3 presented by the petition. Justice Blackmun and Justice Stevens took no part in the consideration or decision of this petition.
12	Aug 9 1984		Brief amicus curiae of Illinois, Indiana and Wisconsin filed.
13	Aug 9 1984		Brief of petitioners R. Anthony Marrese, et al. filed.
14	Aug 10 1984		Joint appendix filed.
15	Aug 13 1984		Lodgings received.
16	Aug 27 1984	I	Motion of Illinois, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
17	Sep 5 1984		Order extending time to file brief of respondent on the merits until September 17, 1984.
18	Sep 6 1984		Record filed.
20	Sep 6 1984		Certified original record 5 C. A. proceedings, 6 volumes (3ex) received.
21	Sep 14 1984		Brief of respondent Am. Academy of Orthopaedic Surgeons filed.
22	Oct 1 1984		Motion of Illinois, et al. for leave to participate in oral argument as amici curiae and for divided argument GRANTED. Justice Blackmun and Justice Stevens DUT.
23	Oct 10 1984		CIRCULATED.
24	Oct 15 1984	R	Supplemental brief of petitioners R. Anthony Marrese and Michael Treister (and Lodging) filed.
25	Oct 22 1984		SET FOR ARGUMENT. Tuesday, December 4, 1984. (4th case).
26	Nov 20 1984	R	Reply brief of petitioners R. Anthony Marrese, et al. filed.
27	Dec 4 1984		ARGUED.

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PETITION FOR WRIT OF CERTIORARI

83-1452 (1)

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CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

R. ANTHONY MARRESE and MICHAEL R. TREISTER,
Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's refusal to consider the principles of Illinois' claim preclusion law while holding that the previous judgments of the Illinois courts bar this exclusively federal antitrust action conflicts with the holding of this Court in *Migra* v. *Warren City School Dist. Bd. of Educ.*, ___ U.S. ___, 104 S.Ct. 892, 896 (1984), that "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered"?

2. Whether it is one of the "accepted principles of res judicata" that no party may be precluded by a prior litigation from raising a claim that such party could not have raised in that prior litigation, due to the lack of subject matter jurisdiction of the first tribunal over the subsequent claim, and, if so, whether the Seventh Circuit's aforesaid claim preclusion holding also conflicts with *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 398-99 (1981)?

3. Whether a state court's dismissal of a state common law action for failure to allege a claim may preclude a subsequent exclusively federal antitrust action between the same parties, because of the possibility that the plaintiff in the federal antitrust action could previously have brought a state antitrust claim against the defendant in that action (but did not), when the available state antitrust statute provides for more limited relief than that which is provided by the federal antitrust laws?

4. Whether, in a federal antitrust action against a national medical association alleged to possess substantial market power, an alleged continuing conspiracy by the members of that association to limit the output of expert testimony for plaintiffs in medical malpractice actions against those members and to deter direct quality competition, by arbitrary and unexplained refusals of membership to any doctors who engage in such practices, must be judged under the Rule of Reason as opposed to the doctrine of facial invalidity or per se illegality?

5. Whether, in the absence of any privilege against discovery, a special First Amendment "interest" applies to the membership files of national professional associations, but not trade associations, so as to overcome the general federal policies of discovery and antitrust enforcement and to prevent, in the case of national professional associations, federal antitrust discovery that would be appropriate in the case of trade associations?

6. Whether the proper standard of review of discovery orders in the federal courts is the "no reasonable person could agree" standard employed in the Seventh Circuit prior to the present decision, the "gross abuse of discretion resulting in fundamental unfairness" standard employed in the Eighth Circuit, or the "firm conviction of mistake" standard now required by the Seventh Circuit's decision?

7. Whether the reversal of the discovery orders concerned in the present decision so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, when: (a) such reversal was based upon a lack of additional, alternative protections that were not sought from the district court because the respondent did not want them; (b) the respondent had made incriminating arguments to the district court based upon the substantive contents of the materials sought to be discovered; (c) the respondent had repeatedly represented to the district court and the petitioners that it would make the required production but then refused to do so; and (d) the circuit court accepted the district court's finding that, without the required production, the petitioners were effectively prevented from proceeding with their case?

8. Whether a federal court of appeals may reverse a district court's invited finding of criminal contempt of its discovery orders on the basis of the appellate court's finding that the underlying case lacks merit?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

R. ANTHONY MARRESE AND MICHAEL R. TREISTER,

Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, R. Anthony Marrese, M.D. ("Dr. Marrese"), and Michael R. Treister, M.D. ("Dr. Treister"), hereby respectfully request that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Seventh Circuit entered on January 3, 1984, as corrected on January 10, 1984, and as amended on February 14, 1984.

OPINIONS BELOW

The in banc opinion of the Court of Appeals in both Case No. 83-2683, the certified appeal of the claim preclusion issues, and Case No. 81-2671, the appeal of the district court's judgment of criminal contempt, is reported at 1984-1 *Trade Cas.* ¶65, 797, pp. 67,311-339, and at 46 *Antitrust & Tr. Reg. Rpt.* 96-114, and appears as Appendix A hereto in its corrected, amended form. The amendment appears as Appendix T. The two previous, successively vacated panel decisions of the Court of Appeals in Case No. 81-2671 (Justice Stewart dissenting) are reported at 692 F.2d 1083 and at 706 F.2d 1488, respectively, and appear as Appendices B and C.

The district court's four successive opinions holding against the claim preclusion of this federal antitrust action by the previous state common law actions are reported at 496 F.Supp. 236 and 524 F.Supp. 389 and appear as Appendices E, F, G and H.

JURISDICTION

The judgment of the Court of Appeals (Appendix O) was entered on January 3, 1984. The first previous order vacating the first previous panel decision and granting rehearing in banc was entered on January 25, 1983. The order of February 23, 1983, setting that rehearing for March 30, 1983, was vacated on March 28, 1983, followed by the issuance of the second panel decision. The order vacating that decision, too, and again granting rehearing in banc was entered on July 19, 1983.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The First Amendment to the United States Constitution; 15 U.S.C. §§1, 15(a), 15c(a); 28 U.S.C. §§1254(1), 1292(b), 1738; FRCP 26(b)(1), (c), (d), 37(a)(4) and 52(a); and Ill.Rev.Stat. ch. 38, §§60-3(1)-(4), 7(2) and ch. 110, §2-614 are set forth as Appendix U.

STATEMENT OF THE CASE

A. The Petitioners and their Applications

Drs. Marrese and Treister are orthopaedic surgeons practicing in the areas of Evansville, Indiana and Chicago, Illinois, respectively. At all times relevant hereto they have been board-certified specialists in that practice and have also met each of the respondent's other objective professional qualifications for membership (R.11, ¶¶44-46). They have each applied for and been refused such membership twice — the first time as soon as they had met those objective qualifications and the second time after waiting the three years required for any reapplication. On the first occasion, the respondent denied them both any explanation of their rejections or any opportunity to question those decisions, whereupon they brought suit to obtain such alleged due process

rights in the Illinois courts. On the second occasion, after the dismissal of Dr. Treister's state common law action and the commencement of the present action, the respondent informed them both that it would not process their applications due to their supposed breach of a "contract" obligation imposed by its admissions requirements never to "question" in any manner an adverse admissions decision (R.49; R.86).

B. The Respondent and the Costs of Exclusion

The respondent is the dominant national trade association in the market for orthopaedic surgical services. *Wilk* v. *American Medical Ass'n*, 719 F.2d 207, 212 (7th Cir. 1983).

Because virtually all full-time orthopaedic surgeons seek membership in the respondent after completing the required three years of exclusive orthopaedic surgical practice, and because a very high percentage of those are admitted (id.), *rejection* for that membership is, as alleged, a cause of general professional "suspicion and disgrace" (R.11, ¶¶12-13). Rejected applicants are generally assumed to be either incompetent or unethical or both (id.; S.R. 175, p. 6). Consequently, both petitioners have suffered substantial losses of professional referrals of patients, beyond the inevitable losses resulting from the absence of their names from the respondent's nationally circulated membership directory (R.133, pp. 12-13). For the same reason, despite years of efforts, Dr. Treister has not yet been able to attract an American-born orthopaedic surgeon to join his practice (R.90, pp. 1-2). Nonmembers of the respondent are also denied access to, among other things, its various important subspecialty societies, such as the American Orthopaedic Society for Sports Medicine (R.32, ¶10A).

Furthermore, the petitioners' "staff privileges at several hospitals" (App. A-2) were all or almost all obtained *prior to their rejection for membership in the respondent*. In an era of emerging competition for such staff memberships, an applicant's compulsory disclosure of his exclusion from any professional association or society is a constant threat to his

practice. Thus, for example, Dr. Treister incurred substantial expense and difficulty in maintaining his staff privileges at one hospital after his exclusion from the respondent and his state court dismissal (R.11, ¶63).

C. The Proceedings Below

As described in the Plurality Opinion of Judge Posner (App. A-1 to 2), this federal antitrust action under section 1 of the Sherman Act was brought after both petitioners had unsuccessfully sought state court relief for their unexplained exclusions based upon a state common law theory of associational rights. The Illinois courts ruled that applicants to any association have no Illinois common law right to be treated fairly unless membership in that association constitutes a strict "economic necessity" (id.). In a lengthy dissent sounding antitrust themes (App. S: see App. E-14, n.6), Justice Seymour Simon dissented.

The district court sustained this antitrust action because of the fact that it *could not have been brought in the Illinois courts*, because of the absence of any previous findings of fact by the Illinois courts and the irrelevance of any previous findings of law, and because of specific allegations such as those contained in ¶¶49-56 of the Amended Complaint. Those allegations concerned the respondent's long-continued purpose and effect of using its arbitrary admissions process on a nationwide basis to coerce all applicants and potential applicants for its membership into obeying conventional professional business practices. Dr. Treister was allegedly punished for having testified for a plaintiff in a medical malpractice case against one of the respondent's members (App. A-65). Both he and Dr. Marrese were allegedly victimized by a continuing conspiracy to deter direct quality competition among orthopaedic surgeons (including, in Dr. Marrese's case, his supposedly "aggressive" practice of treating former patients of his competitors without their referral by those competitors) and by an integrally related conspiracy to conceal that alleged illegal purpose by means of the respondent's purported contract against any "questioning" of its actions.

After this action was sustained, the petitioners sought the discovery of their application files and those of any other rejected applicants for membership in the respondent between 1970 and 1980. When the respondent objected to this discovery demand on First Amendment and "contract" grounds (R.34, 35), the petitioners proposed a compromise in the form of a "redaction agreement" (App. A-39). The respondent refused, just as it did before the Court of Appeals when the subject again came up (id.), although Dr. Treister then again expressed his willingness to accept such an agreement (id.).

The criminal contempt judgment involved in Case No. 81-2671 resulted from the respondent's defeat in the district court discovery litigation that followed its refusal of the above-mentioned compromise. Adhering to its First Amendment and "contract" objections, the respondent did not seek a protective order from the district court prior to the entry of the March 5, 1981, order requiring the production of the requested files pursuant to an "eyes only" protective order the details of which were to be worked out, if possible, by the parties themselves (App. K). In that same order, the district court found that, without the prompt production of the files in question, the petitioners would be effectively prevented from continuing with the action (App. K-7 to 9). It also found that, in light of the respondent's inability to cite any basis for a claim of privilege under FRCP 26(b)(1) except for its First Amendment arguments and in light of the insubstantiality of those arguments, the petitioners' motions for sanctions should be granted "in implementation of the mandate" of FRCP 37(a)(4).

The respondent's one motion prior to the March 5 production order was for a so-called "Temporary Limitation on the Scope of Discovery" to the issue of whether the petitioners had suffered any injury in fact (App. P). The district court denied that Rule 26(d) motion on a variety of grounds not later questioned by the Court of Appeals (see App. A-20 to 21, referring to other discovery that the *petitioners* might have

been required to perform; the respondent's discovery of the extent of the petitioners' injury in fact never began because the respondent never sought to take either petitioner's deposition). Just before that ruling, that court had received the respondent's brief arguing that the petitioners did not need to see the files of other rejected applicants because all their contents except for the application forms and the formal rejection letters had already been "deleted," and that they did not need to see their own files because the detailed evaluative and procedural information that was admittedly still contained in them would not "substantially add to or detract from the [petitioners'] general understanding of the facts" (App. Q).

At the first hearing on the March 5 order, the respondent's attorneys assured the court that their prompt agreement upon a suitable form of protective order would present "no problem" (R.131, pp. 3-5). Twelve days later, they again made such representations to the court (R.132, p.7) but moved for "reconsideration" of the inclusion in that order of the files of "nonparty applicants" on the (instantly rejected) grounds of those files' supposed "irrelevance" to this antitrust action. By the same motion, they also sought and were granted an extension of fourteen days within which to make the latter production (R.110, ¶¶12-13; R.132, p. 7).

Unknown to the court or the petitioners' attorneys, prior to the March 17 hearing the respondent's attorneys had dispatched a public mailing to many of its members warning them, without qualification, that on March 16 it would produce the petitioners' files. That mass mailing soon elicited the *Bodner* class action by the respondent's own members "against" it to "compel" it to refuse such production (S.R. 174, p. 11). The respondent was also then preparing a motion for preliminary injunction which, in effect, sought to enjoin compliance with the March 5 order (App. L).

Neither stratagem succeeded (id.; R.133, pp. 27-28). On March 24, the district court treated *Bodner* itself as verging on a contempt of court (R.133, pp. 27-28), and on April 6, with

the respondent still not having sought either *in camera* inspection of the files or a redaction arrangement (App. A-39), the court denied the motion for a preliminary injunction and entered its own protective order in a form that was approved in *Memorial Hospital for McHenry County* v. *Shadur*, 664 F.2d 1058 (7th Cir. 1981).

The respondent thereupon refused production, took an appeal of the denial of its motion for preliminary injunction, suffered a dismissal of that appeal for want of jurisdiction, and continued in its contempt for months until it successfully *invited* the entry of the criminal contempt judgment of October 5, 1981 (App. N). That is the order which the Seventh Circuit eventually reversed, after unprecedented difficulties with the first two panel decisions had required the vacating of not only the first (App. B) but also even the second, narrower decision (App. C), in Case No. 81-2671.

The district court ruled against the respondent on the claim preclusion issues three successive times before the criminal contempt citation (App. E, F and G) and once again shortly afterward (App. H). However, another district judge who had been assigned to the case in early 1983 certified those issues (and certain preclusion issues) for interlocutory appeal on September 14, 1983, six days before the scheduled in banc rehearing of the criminal contempt appeal (App. I). On Friday, September 16, the Seventh Circuit accepted that certification for hearing in banc together with the criminal contempt appeal (App. J).

The combined in banc hearing took place on September 20 (App. A-1). It resulted in a 5-4 vote to require the dismissal of the action on claim preclusion grounds and a differently divided 5-4 vote to reverse the criminal contempt judgment. If Justice Potter Stewart's two previous dissents to the two previously vacated panel decisions also authored by Judge Posner (App. B and C) had been included, both the district court's orders that gave rise to these appeals would have been affirmed by an evenly divided court.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S 5-4 DECISION OF THE CLAIM PRECLUSION APPEAL HAS IGNORED THIS COURT'S RULING IN *KREMER*, NOW CONFIRMED IN *MIGRA*, THAT THE FULL FAITH AND CREDIT STATUTE REQUIRES THE APPLICATION OF STATE CLAIM PRECLUSION PRINCIPLES.

In *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982), Justice White wrote for this Court that:

> "It has long been established that [28 U.S.C.] §1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken."

Yet, the Plurality Opinion of the claim preclusion decision held that this fundamental federal procedural statute was irrelevant — that "whether or not section 1738 allows a federal court to give a state court's judgment a greater preclusive effect than the state courts themselves would give it . . ., the statute cannot be used to decide this case" (App. A-7).

The reason offered by the plurality was that the Illinois courts could never have heard this exclusively federal antitrust action in the first place (id.). Yet, the plurality was inconsistent in its treatment of the importance of this factor, for it ultimately concluded that the Illinois common law actions which the petitioners had brought in the Illinois courts precluded their subsequent exclusively federal antitrust claim. In other words, although the plurality first held the factor of exclusive federal jurisdiction to be of such all-controlling importance as to prevent any possible application of the Full Faith and Credit statute, when it consequently turned to consider the claim preclusion issues

under the federal common law of claim preclusion, it held that same factor to be of no importance.

The plurality's analysis of the relationship of exclusively federal actions to section 1738 was also intrinsically illogical. It can be reduced to the following logical contradiction: While section 1738 bars a federal court from granting greater preclusive effect to a state judgment than the state courts would grant it in all cases in which federal jurisdiction is *not* exclusive, when the need for federal adjudication is so compelling that federal jurisdiction has been declared exclusive, then a state judgment may be granted greater preclusive effect than it would receive in the state courts. Thus, by the plurality's reasoning, a state judgment may preclude (and was here held to preclude) federal adjudication *only* in those cases in which the need for federal adjudication is most compelling. Such a result, as Justice Brennan wrote in *Steffel* v. *Thompson*, 415 U.S. 452, 472 (1974), "would turn federalism on its head."

Judge Flaum's concurring opinion did not go so far as to hold the Full Faith and Credit statute to be irrelevant. Instead, according to him, the statute merely set a minimum requirement of claim preclusion, i.e., the preclusive effect, if any, that the prior state court judgment would have in the state courts. Therefore, he held that the federal courts were free to accord greater preclusive effect than that required minimum effect to such a judgment (App. A-26), and that the petitioners' failure to sue the respondent "relatively contemporaneously" in *both* the state and federal courts required that such greater preclusive effect be accorded here (App. A-31 to 33).

Judge Bauer's concurring opinion necessarily agreed with either the plurality's or Judge Flaum's analysis of this threshold issue, because otherwise it could not have reached the same result (App. A-23).

However, *Migra* v. *Warren City School Dist. Bd. of Educ.* ___ U.S. ___, 104 S. Ct. 892 (1984), has now put an end to all

such misconceptions. Citing *Kremer*, supra, and *Allen* v. *McCurry*, 449 U.S. 90, 96 (1980), this Court there once again held that a federal court must give the *same* preclusive effect to a prior state court judgment that such judgment would have in the courts of that state — not more, not less, but the "same." And that necessary result must be achieved by applying the principles of that state's claim preclusion law, not those of federal common law.

In the concurring opinion in *Migra*, Justice White, joined by Chief Justice Burger and Justice Powell, cited other precedents of this Court dating back at least as far as its decision in *Union & Planters' Bank* v. *Memphis*, 189 U.S. 71, 75 (1903), for the settled rule that a federal court " 'can accord [a state judgment] no greater efficacy' than would the judgment-rendering state" (*Migra*, supra, at p. 899). The concurring Justices questioned the desirability of this construction of the statute. However, they also correctly perceived that any change in the rule at this date, after so long a history of consistent decisions by this Court, would have to come from Congress (id., p. 900).

Therefore, the present Seventh Circuit decision of the claim preclusion appeal must be reversed for conflict with the foregoing decisions of this Court, before its illogical approach spreads confusion among the circuits. Already, the Ninth Circuit is in conflict with the Seventh Circuit on this important issue of the applicability of 28 U.S.C. §1738 to exclusively federal actions (see the recognition of the relevance of the *Kremer* rule in *Derish* v. *San Mateo-Burlingame Bd. of Realtors*, 1984-1 *Trade Cas.* ¶65,771, at p. 67,169 (9th Cir. 1983)). Although this federal antitrust action could not have been brought in the Illinois courts, that is not a good argument for treating the previous Illinois court actions as if they had been brought in federal court so that the Full Faith and Credit statute could not apply. As the dissenters to this decision reasoned, a proper respect for that statute and for the many decisions of this Court construing it, requires the application

of the *principles* of Illinois' claim-preclusion law in judging this case (App. A-51 to 52).

There is no need for a remand for the lower courts' determination of the details of that state law, because the dissenters emphasized at least one unquestioned state law principle that prevents the preclusion of this action:

> "Apparently, no Illinois judge has questioned the jurisdictional competency [requirement of claim preclusion]; any departure from the rule has presumably been deemed so unfair and illogical as to require no discussion." (App. A-53) (citations omitted: see, e.g., *People* v. *Kidd* (1947), 398 Ill. 405, 408, 75 N.E.2d 851)

As the dissenters added, "even in the course of its more creative efforts at narrowing its own powers," the plurality had at least conceded the jurisdictional incompetency of the Illinois courts to hear the present action (App. A-54).

II. THE PLURALITY OPINION AND THE TWO CONCURRING OPINIONS COULD NOT AGREE UPON A RATIONALE FOR ABANDONING THE LONG-STANDING PRIOR JURISDICTIONAL COMPETENCY REQUIREMENT OF CLAIM PRECLUSION UNDER FEDERAL COMMON LAW. SOUND POLICY AND THE OVERWHELMING WEIGHT OF PRECEDENT REQUIRE THE CONTINUATION OF THE *RESTATEMENT* APPROACH

The Plurality Opinion acknowledged a few of the overwhelming number of authorities for the traditional requirement of prior jurisdictional competency under the federal common law of claim preclusion (App. A-6; see also, e.g., *Central States, Etc.* v. *Old Sec. Life Ins.*, 600 F.2d 671, 676 (7th Cir. 1979); *McGough* v. *First Arlington National Bank*, 519 F.2d 552, 554-55 (7th Cir. 1975); and *Cream Top Creamery* v. *Dean Milk Company*, 383 F.2d 358 (6th Cir. 1967), the latter of which was particularly emphasized by the dissenters because of its analysis of *Becher* v. *Contoure Laboratories, Inc.*, 279 U.S. 388 (1929), but was not mentioned by the plurality). However, based upon the Fourth Circuit's controver-

sial decision in *Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981), as that decision was supposedly "supported" by *Becher* v. *Contoure Laboratories, Inc.*, supra, and as it was further supposedly supported by a "statement" in *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 401 (1981), concerning the federal courts' traditionally "cordial regard" for claim preclusion as an aid to judicial efficiency (App. A-6), the plurality abandoned that requirement.

The plurality sought to dismiss almost all contrary authorities on the basis that they were "mainly pre-*Nash* and pre-*Moitie*" (*id.*). However, notwithstanding the plurality's understandable aversion to pre-1981 precedent, the logic and the elementary fairness of the traditional view that claim preclusion, as opposed to issue preclusion, is impossible when the prior decision was rendered by a court without subject matter jurisdiction over the subsequent action continue unchanged. It is reasonable, the authorities hold, to find an estoppel as to certain issues in such situations based upon prior findings of fact (*Becher* v. *Contoure Laboratories, Inc.*, supra). On the other hand, it has long been held to be unfair and illogical to bar an entire claim that could not possibly have been heard in the prior tribunal. *Oliver* v. *Rumford Chemical Works*, 109 U.S. 75 (1883); *Restatement of Judgments* §71(c)(1942); *Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2d Cir. 1955); *Restatement (Second) of Judgments* §26(1)(c)(1982).

Here, such unfairness and illogic have been carried to an extreme because the only prior state court "findings" were the judgments of the Illinois courts dismissing the petitioners' Illinois common law claims for failing to allege that membership in the respondent association constituted an "economic necessity." *Treister* v. *American Academy of Orthopaedic*, 396 N.E. 2d 1225, 1231-32, 78 Ill. App. 3d 746 (1979). This court has held that the loss of an "economic necessity" is not a necessary element of a federal antitrust cause of action. *Associated Press* v. *United States*, 326 U.S. 1, 18 (1945). Therefore, no federal antitrust issues could even

possibly have been decided by the Illinois court dismissals. Yet, the plurality held that the petitioners' exclusively federal antitrust claim was necessarily precluded because of their previous *failure* to raise *state* antitrust issues in state court.

In short, contrary to the plurality's analysis of *Becher*, supra, its only pre-*Nash* precedent, that issue preclusion case can properly be read as conflicting with the plurality's position. It emphasizes the *particular* unfairness and illogic of precluding an exclusively federal claim by means of a prior state court decision *when no issue relevant to the federal claim has previously been decided* (see App. A-54 to 55, n.11; see generally Point III hereinbelow).

Furthermore, contrary to the plurality's implication that the *Nash* decision revolutionized the federal common law of claim preclusion, the authorities after *Nash* have predominantly favored the traditional position. Indeed, *Federated Department Stores* v. *Moitie*, 452 U.S. 394 (1981), upon which the plurality principally relied in conjunction with *Nash*, strongly suggests adherence to the prior jurisdictional competency test.

As it did with *Kremer* (App. A-7), the plurality simply ignored the critical language in *Federated Department Stores*. There, in summarizing more than one hundred years of precedents on the federal common law of claim preclusion, this Court said (*Federated Department Stores*, at p. 398):

> "*There is little to be added to the doctrine of res judicata as developed in this Court.* A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been* raised in that action." (emphasis supplied) (citations omitted)

In rejecting the Ninth Circuit's proposed "equitable" exception to the "accepted principles of res judicata" (*id.*, p. 399), this Court was in fact expressing its agreement with those "accepted principles."

According to the plurality's view, the ability to raise a state antitrust "issue" in state court makes irrelevant the inability to raise any federal antitrust issue there. However, the plurality realized that this startling departure from all previous understanding of the federal claim preclusion doctrine could hardly be described as a minor "addition" to that doctrine, in keeping with the traditional analysis and approach. Justice Stewart's objection to this "unprecedented result," this "highly dubious . . . expansion of the doctrine of res judicata," in the soon-vacated first panel decision of the criminal contempt appeal (App. B-27 to 28), doubtless assisted that realization. That is the reason for the absence from the Plurality Opinion of any reference to that key aspect of this Court's decision in *Federated Department Stores*.

Furthermore, the Fifth Circuit's in banc decision in *Nilsen* v. *City of Moss Point, Miss.*, 701 F.2d 556, 560 (5th Cir. 1983), the Second Circuit's decision in *RX Data Corp.* v. *Department of Social Services*, 684 F.2d 192, 198 (2d Cir. 1982), and the devastating analysis contained in the *Restatement (Second) of Judgments* §26(1)(c), comment c, illustration 2 (1982), all of which appeared after *Nash* and are directly contrary to the *Nash* innovation, emphasize how "highly dubious" the plurality's position is. Thus, as the six dissenting Judges in *Nilsen* noted:

> "No one can quarrel with the majority's statement that 'res judicata . . . bars all claims that were or *could have been* advanced in support of the cause of action on the occasion of its former adjudication.'"

(*Nilsen*, supra, at p. 564) (emphasis in the original)

They merely failed to anticipate the Plurality Opinion.

Very recently, in *Derish* v. *San Mateo-Burlingame Bd. of Realtors*, 1984-1 *Trade Cas.* ¶65,771 (9th Cir. 1983), the Ninth Circuit reinterpreted its previous decisions holding against the preclusion of exclusively federal claims (e.g., *Clark* v. *Watchie*, 513 F.2d 994 (9th Cir. 1975)) as being consistent with *Nash*. *Derish*, supra, at pp. 67,169-170. However,

that development merely compounds the problem of a conflict among the circuits on this "important question" (App. A-1) of whether the prior jurisdictional competency requirement should be abandoned, with at least three circuits (the Second, Fifth and Sixth) and the great weight of academic authority strongly opposed to such a change but three other circuits (the Fourth, Seventh and Ninth) now in its favor.

The four dissenters to the present decision demonstrated that "*Nash* is a hard case that has made bad law" (App. A-58). The previous state antitrust action at issue in *Nash* had resulted in a *consent decree* granting the State of North Carolina most of the injunctive relief which was the only relief for which it had asked, and the Fourth Circuit's holding that the subsequent treble damages claim of a privy of the State was precluded is therefore best explained by familiar principles of estoppel by settlement (id.). The dissenters also demonstrated the overriding importance of a uniform, expert interpretation of exclusively federal law, *especially* federal antitrust law, and a uniform application of the liberal federal rules of discovery in exclusively federal cases, *especially* in federal antitrust cases (see, e.g., *Key* v. *Wise*, 629 F.2d 1049, 1066 (5th Cir. 1980); compare *Memorial Hospital for McHenry County* v. *Shadur*, 664 F.2d 1058 (7th Cir. 1981), permitting almost identical discovery to that which the Seventh Circuit here denied, although a state law evidentiary privilege would have prevented that same discovery in a state antitrust action). These powerful policy considerations undermine the assumption of *Nash*, *Derish* and the present decision that state antitrust statutes can ever properly substitute for the federal antitrust laws if they are merely identically worded (App. A-61 to 62).

Because of the importance of these policies, Judge Flaum's concurring opinion implicitly rejected *Nash* (App. A-30 to 31). However, his unprecedented alternative to the traditional approach, requiring the filing of "relatively contemporaneous" lawsuits in *both* the state and federal courts, is so illogical and unworkable as by itself to require the rever-

sal of the present decision. His vote was necessary for that decision, and yet his alternative approach would, among other things, lead to the absurdity of a "race to judgment" in both of the parallel, pending actions that he would require between the same parties — in order to avoid the unquestionable claim preclusion of the state action by the federal action if the latter were decided first. *Harper Plastics, Inc.* v. *Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981).

Any departure from the traditional prior jurisdictional competency test leads to such confusion. The law of the circuits has already become confused on this subject because of the lack of any completely unequivocal recent statement by this Court (see *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 674 (1978)). Thus, this important issue of federalism is now ripe for this Court's decision in this case — unless, as the petitioners maintain, the absence of any *Nash* exception under state claim preclusion law is by itself dispositive.

III. THE PLURALITY OPINION'S DISTORTION OF THE SUPPOSED *NASH* EXCEPTION TO THE PRIOR JURISDICTIONAL COMPETENCY REQUIREMENT INVITES SPECULATION BY THE PARTIES AND THE COURTS AND CAN ONLY LEAD TO A CURTAILMENT OF ANTITRUST ENFORCEMENT, AN INCREASE IN FEDERAL CLAIMS AND PENDENT STATE CLAIMS IN THE FEDERAL COURTS, OR BOTH.

Nash and *Derish*, supra, at least limited their holdings of claim preclusion to instances in which a state antitrust claim had been brought and litigated under a state antitrust statute that was "identical" to the federal statutes. *Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, supra, 640 F.2d 484, 488; *Derish* v. *San Mateo-Burlingame Bd. of Realtors*, supra, 1984-1 Trade Cas. ¶65,771, at p. 67,170. (See also Judge Eschbach's dissent to the present decision (App. A-24), holding *Nash* to be "clearly distinguishable in that it involved an attempt to relitigate an antitrust claim" (emphasis in the original)). However, the Plurality Opinion distorted *Nash* into a general principle of the preclusion of exclusively federal claims whenever "materially identical" state law claims might previously have been

brought between the same parties in state court even though no such claims were in fact brought. It further distorted *Nash* by finding such a "material identity" here even though the federal and state statutes concerned were materially different, on the basis of an unprecedented and inherently speculative "tracking" of hypothetical comparative outcomes under the respective statutes.

There is no authority for either of these additional innovations of the plurality, and none was cited. A moment's consideration of the grave public policy consequences of the plurality's approach shows why the Fourth Circuit and the Ninth Circuit, while also willing to abandon the prior jurisdictional competency requirement, confined their holdings to cases of repetitive antitrust litigation under identical state and federal statutes.

First, an inevitable effect of the extension of *Nash* to common law actions having nothing to do with antitrust law would be a substantial reduction of private antitrust enforcement throughout this country. Yet, this Court has repeatedly emphasized the necessity of such enforcement in order to carry out the fundamental social and economic goals of the Sherman Act, and has encouraged such enforcement by excusing plaintiffs from otherwise controlling equitable and legal constraints. *United States* v. *Topco Associates*, 405 U.S. 596,610 (1972); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971); *Perma Muffler* v. *International Parts Corporation*, 393 U.S. 134 (1968).

If a federal antitrust claim were to be lost every time that a common law claim was litigated in state court arising from the same general matrix of facts, many thousands of certain antitrust violators (such as this respondent) would escape prosecution. Plaintiffs or defendants in states such as Illinois, which do not have compulsory counterclaim rules (see, e.g., §2-614 of the Illinois Code of Civil Procedure) and which have traditionally adhered to a similarity of evidence rule for defining the same "cause of action" (see, e.g., *Olson* v. *Olson*, 448 N.E.2d 229, 232, 114 Ill. App. 3d 28 (1983); *Redfern* v.

Sullivan, 444 N.E.2d 205, 208, 111 Ill. App. 3d 372 (1983); *Village of Northbrook* v. *County of Cook*, 410 N.E.2d 925, 929, 88 Ill. App. 3d 745 (1980); see also Judge Cudahy's dissenting opinion at App. A-52, n. 8), may not always immediately force upon complex antitrust theories when they plead a common law action, nor have they ever before been required to do so.

Plaintiffs who consider that they have strong, easily provable state law claims may reasonably think first about achieving an expeditious ruling upon those claims from the state courts that are their natural forum (compare Justice Stewart's insistence upon "the principle, fundamental to our legal system, that parties, not judges, choose the forum" in his dissent to the first panel decision (App. B-27)).

Defendants, in turn, may reasonably wish to concentrate on defeating whatever state law claims are made against them without seeking to institute complex counterclaims based upon laws and theories ordinarily associated with federal court. Although in this particular federal antitrust action the plaintiffs had also been the plaintiffs in state court, and although in the first vacated panel decision of the criminal contempt appeal the majority had regarded that factor as controlling (App. B-12), *the Plurality Opinion now extends to the preclusion of the exclusively federal claims of state court defendants if they might previously have brought state antitrust counterclaims.* No other conclusion can reasonably be drawn from its futile attempt to distinguish the Seventh Circuit's own decision in *Lektro-Vend Corp.* v. *Vendo Co.* 660 F.2d 255, 274 (7th Cir. 1981), which was also rendered after *Noah*, on the ground that there the federal antitrust plaintiff, which had been the state court defendant, alleged that the previous state court lawsuit itself was a part of an overall federal antitrust violation (App. A-12).

Second, for the same reasons, governmental antitrust enforcement would suffer from the aforesaid radical extension of *Noah*. Because of the broad standards of privity that are used to determine the parties which are bound by a judg-

ment (as illustrated by *Noah* itself), state and local antitrust enforcement offices would often discover that some unrelated previous civil or criminal litigation involving the same party that they felt compelled to sue in federal court for federal antitrust violations precluded such a later action, however meritorious and publicly important. For example, by the plurality's reasoning, a state could not sue a steel company for suppressing pollution control technology in violation of the Sherman Act if any state agency or any other governmental "privy" had previously sued that same company in state court for committing a related public nuisance or violation of state pollution control statutes. State and local governmental offices naturally seek to have state law issues decided in state court, and typically do not seek damages even when they do bring state antitrust actions (compare *Noah* with the plurality's analysis of the supposed "irrelevance" of treble damages at App. A-11). Are they, therefore, to forfeit their public right and responsibility (see, e.g., 15 U.S.C. §15c(a), one of the *parens patriae* provisions of the Clayton Act) to seek subsequent exclusively federal relief in appropriate cases?

Third, as the dissenters to the present decision demonstrated, the unprecedented "tracking" approach by which the plurality found a "material identity" between the Illinois Antitrust Act and the Sherman and Clayton Acts, despite obvious differences between those statutes in regard to the standards of liability and the availability of treble damages, is "surely not the path to certainty in the law" (App. A-65). Under section 7(2) of the Illinois Antitrust Act (Ill. Rev. Stat. ch. 38, §60-7(2)), there is no right to treble damages for a violation of section 3(2) of that statute (Ill. Rev. Stat. ch. 38, §60-3(2)), which in its general provision roughly corresponding to section 1 of the Sherman Act. Such a right is available only if an Illinois antitrust plaintiff can prove a violation of the Illinois statute's specific tying agreement prohibition (§3(4)) or else a violation of its specific market division, price fixing or output control prohibitions contained in section 3(1). Contrary to the plurality's repeated implications, that statute's prohibition of output-limitation conspiracies as

such (as opposed to general conspiracies in restraint of trade) *applies only if they are proven to have the purpose or effect of price fixing* (Ill.Rev.Stat.ch.38, §60-3(1)(b)). Furthermore, Rule of Reason treatment is required by that statute for all possible antitrust violations other than those specifically described in sections 3(4) and 3(1), *including, in particular, group boycotts* (see Bar Committee Comments-1967, Smith-Hurd's Ill.Ann.Stat. ch. 38, at pp. 451-53).

Given this maze of differences between the federal and the Illinois statutes, the dissenters were justified in referring to the plurality's unprecedented "tracking" expedition as "more a flight of fancy than an exploration of fact" (App. A-65). Certainly, as they foresaw, another effect of sustaining the plurality's approach would be rank speculation by the parties and the courts about ultimate outcomes and original intentions and irremediable uncertainty about the application of federal claim preclusion law. The plurality's odyssey to its present still hopelessly insupportable "compromise" on the antitrust merits, following its initial radical assertion that no group boycott antitrust violation could ever be shown unless the number of boycotting parties was "so few that competition among them . . . [could not] be relied on to give the consuming public the benefits of competition" (App. C-12 (emphasis supplied); compare App. B-17), hardly inspires confidence in the "tracking" approach. Practicing attorneys simply could not advise their clients definitely about claim preclusion issues if such advice depended upon their best guesses of how variously inclined federal judges might guess about the objectives and final outcomes of hypothetical corresponding state and federal antitrust actions, under differently worded statutes, years in the future.

One last inevitable effect of a continuation of the plurality's approach would be an increase in federal court litigation and a decrease in the determination of state law issues by the state courts. This adverse effect and the aforementioned reduction in antitrust enforcement are not mutually exclusive because the reach of the Plurality Opinion extends to all

exclusively federal actions following state common law actions. Henceforth, if the Plurality Opinion is allowed to stand, every plaintiff with any possibility of any exclusively federal claim will be well advised to come immediately into federal court, including as many state law claims in that action as the federal court, in the exercise of its discretionary pendent jurisdiction, would permit. The plurality's professed concern to alleviate the burden of congested dockets in the *state* courts (App. A-6) is misplaced. In this country's federal system, the states are the only governmental units responsible for dealing with that problem and properly able to do it. Within the federal courts, though, one prominent effect of the plurality's approach would be to add substantially to the very burden of decisionmaking that the plurality professed to seek to avoid. 18 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* §4470 (1981).

IV. THE PLURALITY OPINION'S NOVEL VIEW OF ANTITRUST LAW CONFLICTS WITH THE DECISIONS OF THIS COURT AND ALL OTHER CIRCUITS REQUIRING MINIMAL FAIRNESS IN TRADE ASSOCIATIONAL EXCLUSIONS, CONDEMNING GROUP BOYCOTTS TO COERCE THE TRADE PRACTICES OF COMPETITORS AND REJECTING THE DOCTRINE THAT NAKED RESTRAINTS OF TRADE BY PROFESSIONALS ARE TO BE JUDGED BY MORE FAVORABLE STANDARDS THAN ARE SIMILAR RESTRAINTS BY OTHER PERSONS.

Because of the plurality's unprecedented "tracking" technique, its holding on the claim preclusion issue turned upon its substantive antitrust holding that the petitioners could not possibly prove a *per se* group boycott claim. This holding represented a compromise of the plurality's earlier, truly alarming assertions concerning the impossibility of group boycott antitrust violations in general, under *any* standard (App. C-12). This time, the plurality tacitly conceded that group boycotts for the purpose of coercing competitors'

trade practices might even be per se illegal in *other* circuits,[1] but insisted that they had to be treated under the Rule of Reason in the Seventh Circuit, at least if they involved the exclusion of professional persons from professional associations and did not involve price fixing (App. A-10).

This antitrust analysis ignored the possibility that, as in Dr. Treister's case, trade practice coercion could assume the form of a per se illegal conspiracy to limit the output of a particular type of service, i.e., expert testimony on behalf of medical malpractice plaintiffs, *regardless of whether the purpose or effect of that coercion was to fix the price for that service*. More generally, the plurality's concession that the federal antitrust law of all *other* circuits might be different from that of the Seventh Circuit openly invited this Court's review, especially in view of this Court's recent pronouncement in *Assoc. Gen. Contractors of Cal.* v. *Cal. St. Council*, ___ U.S. ___, 103 S.Ct. 897, 903-04 (1983), confirming the per se illegality of all such coercive conspiracies,[2] and its recent refusals to treat professionals as immune from the ordinary per se rules in *Arizona* v. *Maricopa County Medical Soc.*, 457 U.S. 332 (1982), and *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978).

Three other bases of per se or at least presumptive illegality that the plurality totally ignored are the procedural arbitrariness of the alleged exclusions,[3] the absence of any justification for the arbitrary, covert *standards* used in making them in terms of the respondent's legitimate organizational purposes and needs,[4] and the denial to nonmembers of any access, much less, the required "reasonable and nondiscriminatory" access, to the various important subspecialty societies of this "essential facility."[5]

1. E.g., *Worthen Bank and Trust Co.* v. *National Bank Americard, Inc.*, 485 F.2d 119, 124-25 (8th Cir. 1973); *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tours Manual Committee*, 465 F.2d 178, 187 (5th Cir. 1972); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969).

2. See also, e.g., *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457 (1941); see generally *Report of the Attorney General's National Committee to Study the Antitrust Laws* 133 (1955).

3. E.g., *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *W.W. Montague & Co.* v. *Lowry*, 193 U.S. 38 (1904); *Pacific Stat. & Printing* v. *Northwest Wholesale*, 715 F.2d 1393 (9th Cir. 1983); *Brenner* v. *World Boxing Council*, 675 F.2d 445 (2d Cir. 1982).

4. E.g., *Radiant Burners* v. *Peoples Gas L. & Coke Co.*, 364 U.S. 656 (1961); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1358-59, 1371-72, 1374-80 (5th Cir. 1980); *Deesen* v. *Professional Golfers' Association of America*, 358 F.2d 165 (9th Cir. 1966); *American Fed'n of Tobacco Growers* v. *Neal*, 183 F.2d 969 (4th Cir. 1950); *United States* v. *Addyston Pipe & Steel Co.*, 85 F.2d 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899).

5. E.g., *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir. 1952).

V. THE 5-4 DECISION OF THE CRIMINAL CONTEMPT APPEAL HAS INVERTED THIS COURT'S DECISION IN *NAACP* V. *ALABAMA*, MAKING OF PROFESSIONALS A PRIVILEGED CLASS UNDER THE FIRST AMENDMENT, LESS AMENABLE TO THE DISCOVERY PROCESS THAN ARE OTHER MEMBERS OF SOCIETY.

Judge Posner's third opinion on the discovery and contempt issues involved in Case No. 81-2671, the Majority Opinion on those issues, began by noting that the decision of that appeal did not have to rest "entirely" on the decision to dismiss the underlying action in the certified claim preclusion appeal (App. A-16). A hitherto undisclosed "First Amendment interest" in the secrecy of national professional associations' admissions files (App. A-17 to 18) was the first of the additional reasons cited by the majority as requiring the reversal of the criminal contempt judgment. This "interest" was said to arise from the respondent's supposed nature as a "professional" association, not a mere "trade" association, which served as a "forum for exchanges of information about surgical techniques and related matters of substantial public interest" (App. A-18).

The majority's suggestion that professional knowledge about "surgical techniques" and "related matters" might be significantly impaired by permitting these petitioners to

obtain this discovery, subject to the district court's strict protective order, was arrant speculation and nonsense. The district court had specifically found, in denying the respondent's motion for a preliminary injunction, that any such concerns were at best "greatly overstated" (App. L-6), and the Majority Opinion simply ignored that finding. Instead, it relied upon the petitioners' supposed acquiescence in the respondent's self-description, in its "contract" counterclaim against the petitioners, as a sort of honorary, philanthropic research society (App. A-18). Yet, as even a glance at the petitioners' reply to that pleading reveals (R.49,¶2), although they agreed that research and education were included among the respondent's diverse functions, they expressly denied that these were its exclusive, or even its primary, functions (see also App. A-45 to 48).

The majority's single supposed authority *for* its holding on the First Amendment issue, *NAACP* v. *Alabama*, 357 U.S. 449 (1958), in fact destroyed it. The contrast between the acute "chilling effect," the marginal relevance of the discovery demand and the purposes of the civil rights organization there concerned, and the unprecedented, undefinable First Amendment "interest" somehow here located in the respondent (and in all other *professional* associations) is so extreme as to make the plurality's reliance upon that case appear cynical.

The majority's citation of *Herbert* v. *Lando*, 441 U.S. 723 (1979), as supporting its bizarre theory that the petitioners had engaged in "predatory discovery" *by bringing this action* (App. A-22), seems equally cynical. There, in a defamation action involving a real and substantial First Amendment claim to privacy, this Court held that the respondent television network and its employees could not use that claim to block discovery into its editorial process (id., at p. 175). Even a genuine First Amendment right, this Court found, had to allow for essential discovery by private litigants (id). Thus, the clear precedent of this Court overrides the majority's self-proclaimed discovery of a First Amendment "interest" sufficient to withstand essential federal antitrust discovery in this case. (See also, e.g., *N.C. Elec. Membership* v. *Carolina Power & Light*, 666 F.2d 50, 53 (4th Cir. 1981)).

VI. THE SEVENTH CIRCUIT'S NEW "MISTAKE" STANDARD FOR THE REVIEW OF DISCOVERY ORDERS SUBSTITUTES THE APPELLATE COURT'S OPINION FOR THE DISTRICT COURT'S DISCRETION IN MANAGING THE DISCOVERY PROCESS.

The standard of review adopted by the Majority Opinion, that a discretionary order must be reversed if the court has a "firm conviction that [the district judge] has made a mistake" (App. A-16), has never before been utilized by an appellate tribunal. The sole authority cited by the majority for this proposition, *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), did not even suggest such a test; it held that a discretionary discovery order was reversible only where "an abuse of discretion [was] shown" (id., at p. 436).

The "firm conviction of mistake" standard of the majority is tantamount to the "clearly erroneous" standard of FRCP 52(a) for reviewing a trial court's findings of fact. However, while that standard is appropriate for the review of such findings, a narrower scope of review is required in the appellate review of any discretionary trial court order. As this Court has repeatedly held, such orders may only be reversed upon a showing of *at least* an "abuse" of discretion. *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752 (1980); *National Hockey League* v. *Metro Hockey Club*, 427 U.S. 639 (1976).

It is essential that a trial court's discretion be at its maximum in making discovery orders. Otherwise, the numerous discovery issues that arise during any complex litigation would all become a subject of appeal, and the authority of the district court to guide the fact-finding process quickly toward its proper goal of a just resolution of the material issues would be thrown into constant doubt. If, for example, every nicety of a protective order were to become an appealable matter, any party (such as this respondent) wishing to delay the fact-finding process might well prefer not to cooperate in shaping

such an order, and the court itself might well refrain from resolving any final details on its own. Therefore, at least one circuit, the Eighth, has wisely adopted the "gross abuse of discretion resulting in fundamental unfairness" standard of review of such orders. *Voegeli* v. *Lewis*, 568 F.2d 89, 96 (8th Cir. 1977).

Indeed, in the Seventh Circuit, prior to the present decision, the general standard of review for all discretionary orders was that of whether any reasonable person could agree with them. *Harrington* v. *DeVito*, 656 F.2d 264, 269 (7th Cir. 1981). Justice Potter Stewart, Chief Judge Cummings and the other dissenting Judges of the Seventh Circuit as well as the highly regarded District Judge who issued these discovery and contempt orders are all "reasonable persons," all of whom found that a proper balancing of the opposing parties' interests certainly *permitted* this discovery. Justice Stewart himself praised the district court's balanced approach and its "careful assess[ment]" of the parties' conflicting interests (App. B-22). Above all, it must be reemphasized that the district court found that this discovery was so absolutely essential that without it the petitioners could not proceed with their federal antitrust case (id.; App. K-7 to 9).

Because the majority could not reach the result that it desired under any previously accepted standard of review, it reached out to the Tenth Circuit for support for the novel "mistake" standard that it here enunciated. Unless that harmful standard is promptly corrected, the entire federal discovery process will suffer the consequences.

VII. THE RECORD IN THIS CASE PLAINLY SHOWS THE NEED FOR THIS COURT'S EXERCISE OF ITS SUPERVISORY POWER TO PREVENT APPELLATE COURT IRREGULARITIES; THE ONLY ABUSE OF DISCOVERY HAS BEEN THAT OF THE RESPONDENT, AND THERE CAN HAVE BEEN NO ABUSE IN DENYING THE RESPONDENT ADDITIONAL PROTECTIONS THAT IT DID NOT WANT AND HAD REPEATEDLY WAIVED.

Regardless of which standard of review is appropriate for discovery orders, the Majority Opinion could not have

applied such standard properly here for it reversed the district court on points that had never been raised before it — points such as the absence of a "redaction" feature in the protective order or the possible desirability of postponing discovery of the files until the petitioners had conducted discovery on the issue of overall adverse market effects (App. A-19 to 21). If a trial court is to be allowed any discretion at all in discovery matters, then a minimal requirement of such discretion is that its discovery orders must not be reversed on the basis of arguments that were never made before it.

Even in regard to the review of nondiscretionary rulings, this Court has held it to be improper for an appellate court even to consider arguments for reversal that are raised for the first time on appeal, at least unless fundamental fairness requires such consideration. *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1949); see also, e.g., *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329, 1333 (7th Cir. 1977). Any other interpretation would thwart the federal discovery process, encourage incessant delays and appeals and, in effect, nullify the plain requirements of FRCP 26 (c) and (d) that protective orders and postponements of the ordinary course of discovery only be granted "upon motion," "in the interests of justice" and "for good cause shown." Whatever else may be said about the Majority Opinion (and see the dissenters' most unusual remarks about its "heavy pall of prejudgment" at App. A-34 and 45-46), it cannot possibly be said that "fundamental fairness" required such a surprise, retroactive ruling here. The majority invented arguments for reversal but ignored the respondent's refusal to make production under any circumstances (App. A-39), its unwitting admissions of liability (App. Q) and its repeated waivers of, or at least estoppels to assert, any possible evidentiary privilege (App. Q, R).

VIII. THERE IS NO AUTHORITY FOR THE MAJORITY'S HOLDING THAT A CRIMINAL CONTEMPT OF A DISCOVERY ORDER TURNS UPON THE MERITS OF THE UNDERLYING CASE; IN THIS REGARD, THE PRESENT DECISION HAS REVERTED TO THE POSITION OF THE FIRST DECISION OF THE SAME APPEAL, WHICH JUSTICE STEWART SEVERELY CRITICIZED AS DEPARTING FROM "LONG-SETTLED PRINCIPLES OF CIVIL PROCEDURE" (APP. B-24).

As previously noted under Point V, the Majority Opinion in the criminal contempt appeal was expressly based in large part upon the outcome of the claim preclusion appeal (App. A-15 to 16). The majority acknowledged that it could find no authority for this position (id.). The reason is the strong policy against such encouragement of criminal contempts, as recognized by this Court in *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), and other cases. For this Court to permit this deliberately invited criminal contempt judgment to be reversed in any part upon the basis of the Seventh Circuit's finding of a lack of merit of this federal antitrust action would surely confirm the warning of Justice Stewart in his dissent to the first panel decision, that "such a result will interfere with the District Judge's authority to control the discovery process and encourage the filing of interlocutory appeals in the heavily burdened federal courts" (App. B-25).

CONCLUSION

For the foregoing reasons, these petitioners respectfully pray that this important in banc decision be reviewed.

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APPENDIX

No. 83-1452

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In The

Supreme Court of the United States

October Term, 1983

R. ANTHONY MARRESE and MICHAEL B. TREISTER,

Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondent.

APPENDIX TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 81-2671, 83-2663

R. ANTHONY MARRESE and MICHAEL R. TREISTER,

Plaintiffs-Appellees,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 1405—William J. Bauer, *Judge.*

ARGUED FEBRUARY 28, 1982—REARGUED EN BANC SEPTEMBER 20, 1983—DECIDED JANUARY 3, 1984

Before CUMMINGS, *Chief Judge*, and PELL, BAUER, WOOD, CUDAHY, ESCHBACH, POSNER, COFFEY, and FLAUM, *Circuit Judges.*

POSNER, *Circuit Judge.* These consolidated appeals present important questions relating to the scope of the doctrine of res judicata in our system of dual state and federal courts, and to the responsibilities of federal district judges in controlling pretrial discovery.

In 1976 the American Academy of Orthopaedic Surgeons, a private association, rejected the plaintiffs' applications for membership, without a hearing or a statement of reasons. The plaintiffs sued the Academy in an Illinois

state court, claiming among other things that the common law of Illinois and the Illinois constitution required the Academy to grant a hearing on their applications and to use reasonable standards in deciding whether to accept the applications. The plaintiffs made no claim under Illinois antitrust law; nor did they, at that time, bring a federal antitrust suit.

The Illinois Appellate Court ordered Dr. Treister's complaint dismissed for failure to state a claim, noting that membership in the Academy is not an "economic necessity." *Treister v. American Academy of Orthopaedic Surgeons*, 79 Ill. App. 3d 746, 755-56, 398 N.E.2d 1232, 1232 (1979), and the Illinois Supreme Court denied leave to appeal, 79 Ill. 2d 630 (1980). Though alleged to confer professional advantages, membership in the Academy is not required for practicing as an orthopaedic surgeon or obtaining hospital staff privileges. Both plaintiffs are certified to practice orthopaedic surgery and have staff privileges at several hospitals.

Dr. Marrese was not a party to the appeal, but his suit was stayed pending Treister's appeal and was dismissed after Treister lost his appeal.

After losing in the Illinois Appellate Court, Dr. Treister (joined by Dr. Marrese) brought this suit in federal district court for damages and injunctive relief under section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint alleged that the Academy is "a monopoly in its field, possessed of substantial power to control the market for orthopaedic surgical services," and that the plaintiffs were refused membership because they compete too vigorously with existing members of the Academy. The Academy moved to dismiss the complaint on the ground that the judgment in the plaintiffs' state-court action against the Academy was res judicata in the present suit. The motion was denied, 696 F. Supp. 236 (N.D. Ill. 1988), on reconsideration, 724 F. Supp. 569 (N.D. Ill. 1951). The Academy asked the district judge to certify his denial for an immediate appeal under 28 U.S.C. § 1292(b), arguing that whether the suit was barred by res judicata was a controlling question of law. The judge refused and pretrial discovery began. The plaintiffs asked the Academy to produce its files relating to all denials of membership applications between 1970 and 1980. The Academy refused. When it persisted in its refusal after the district judge issued an order to produce, the judge held the Academy in criminal contempt and fined it $10,000. See Fed. R. Civ. P. 37(a)(2), 37(b)(2)(D).

No. 91-2671 is the Academy's appeal from the contempt judgment. A panel of this court reversed the judgment more than a year ago, 892 F.2d 1283 (1989), but rehearing en banc was granted and the panel decision was vacated (the practice in this circuit when rehearing en banc is ordered, see Circuit Operating Procedure 5(f)). However, the order granting rehearing en banc was later vacated and the original panel issued a new decision, again reversing the judgment of contempt, but on a narrower ground. 906 F.2d 1469 (1990). Rehearing en banc was again sought and granted, and the second panel decision was vacated. Shortly before the rehearing, Judge Plunkett, to whom the case in the district court had been reassigned from Judge Shadur, certified Judge Shadur's order denying the Academy's motion to dismiss the complaint on the ground of res judicata for immediate appeal under section 1292(b). The plaintiffs questioned Judge Plunkett's jurisdiction to issue such a certification in light of the pendency of the appeal from the contempt judgment. But a motions panel of this court held that he had jurisdiction, authorized the appeal (which is No. 93-8003), and ordered it consolidated with No. 91-2671 for the en banc hearing.

The jurisdictional ruling was correct. The Academy's appeal from the contempt judgment did not bring the whole case up to this court but just the contempt proceeding, a collateral branch of the case. The rest of the case remained (and remains) pending in the district court before Judge Plunkett. The contempt judgment itself was appealable under 28 U.S.C. § 1291. *Bray v. United States*, 423 U.S. 73 (1975).

We begin with No. 83-3563. As the main purpose of the doctrine of res judicata is to protect a defendant from being worn down by a plaintiff who sues him over and over again for the same allegedly wrongful conduct, a plaintiff may not sue the defendant on one theory and having lost try again on a different one. E.g., *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981); *Mandarino v. Pollard*, 718 F.2d 845, 849-50 (7th Cir. 1983); *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1277 (7th Cir. 1983); *Lee v. City of Peoria*, 685 F.2d 196, 198 (7th Cir. 1982); *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981). But that is what the plaintiffs have been doing in this case. After being denied membership in the Academy almost eight years ago, they sued the Academy in state court under a variety of theories. Although they could have alleged a violation of the Illinois Antitrust Act, § 3(2), Ill. Rev. Stat. 1981, ch. 38, § 60-3(2), they did not; and although they could have brought a federal antitrust suit in federal court at the same time and joined their state law claims as pendent claims, they did not do that either. They waited till they had lost their state law suits and only then—after four years of litigating in state court the lawfulness of the denial of their membership applications—did they bring suit. No reason has been given or appears why they did not bring an antitrust suit, state or federal or both, at the time of their initial suits. The plaintiffs assert that the Academy's antitrust liability is clearly established by *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)—a case that had been on the books for 17 years when the initial suits were filed.

But we are told that there is a technical obstacle to applying the doctrine of res judicata here: the plaintiffs could not have joined a Sherman Act claim with their state law claims in a suit brought in state court because federal courts have exclusive jurisdiction to enforce the federal antitrust laws. This proposition can be questioned. No statute purports to make the federal courts' jurisdiction over federal antitrust suits exclusive; compare 28 U.S.C.

§ 1338(a), which makes the jurisdiction of the federal courts in patent and copyright cases "exclusive of the courts of the states," with 15 U.S.C. §§ 15, 26. And it is hard to understand why state courts should be thought less competent to enforce the federal antitrust laws than the federal civil rights laws—which they have jurisdiction concurrently with the federal courts to enforce, *Martinez v. California*, 444 U.S. 277, 283 n. 7 (1980)—particularly when state courts can adjudicate federal antitrust defenses with preclusive effect on questions of fact under the doctrine of collateral estoppel in a subsequent federal antitrust suit. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 188, 189 (2d Cir. 1955); *RX Data Corp. v. Department of Social Services*, 684 F.2d 192, 196-97 and n. 4 (2d Cir. 1982); *Calvert Fire Ins. Co. v. American Mutual Reinsurance Co.*, 600 F.2d 1228, 1236 n. 18 (7th Cir. 1979) (dictum). We nevertheless accept, as settled law that only the Supreme Court can at this late date reconsider, that the plaintiffs could not have brought their Sherman Act suit in an Illinois state court. See *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440-41 (1920); *General Investment Co. v. Lake Shore & Mich. S. Ry.*, 260 U.S. 261, 287 (1922); *Kuré v. Pleasure Driveway & Park Dist.*, 583 F.2d 378, 379 (7th Cir. 1978) (per curiam). But see Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 Harv. L. Rev. 509, 510 n. 13 (1957).

The plaintiffs could, however, have joined with their other state claims a claim under the Illinois Antitrust Act, and if that Act is materially identical to the Sherman Act their failure to do so bars this suit under *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 487-93 (4th Cir. 1981). The Attorney General of North Carolina had brought a state antitrust suit against a number of dairy companies. After final judgment was entered in that suit, a local board of education (held to be in privity with the state attorney general) brought a federal antitrust suit against the same defendants. The federal suit involved the identical facts and was brought under a federal antitrust

statute that was worded identically to the state antitrust statute. The Fourth Circuit held the federal suit barred by res judicata.

Nash is supported by Justice Holmes' opinion for the Supreme Court in *Becker v. Contours Laboratories, Inc.*, 279 U.S. 388, 391-92 (1929), by academic authority, see Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 347-48 (1978), by the statement in *Moitie* that res judicata " 'should be cordially regarded and enforced by the courts,' " 452 U.S. at 401, quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917), and by the practical need to contain the enormous growth of litigation in both state and federal courts by insisting that people litigate their claims in an economical and parsimonious fashion—a consideration emphasized in *Moitie*, see 452 U.S. at 401. True, there is much authority that is at least superficially contrary. See, e.g., *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759, 762 (2d Cir. 1968); *Clark v. Watchie*, 513 F.2d 994, 997 (9th Cir. 1975); *Hayes v. Solomon*, 597 F.2d 958, 984-85 (5th Cir. 1979); *RX Data Corp. v. Department of Social Services*, supra, 594 F.2d at 198; Restatement (Second) of Judgments § 26, illustration 2 (1980). Cf. *Kurek v. Pleasure Driveway & Park Dist.*, supra, 583 F.2d at 379. See generally 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4470 (1981). But it is mainly pre-*Nash* and pre-*Moitie*; we have found no decision that expressly rejects *Nash*, and, most important, no case that involves the precise situation in *Nash*—a state law that is a mirror image of federal law. *Hayes v. Solomon*, for example, emphasizes the difference between the state and federal statutes involved in that case. See 597 F.2d at 984. And in the recent case of *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 913, 918 n. 1 (9th Cir. 1982), the conduct challenged under federal antitrust law was outside the scope of the state antitrust law, so *Nash* was inapplicable.

It is not a good argument against *Nash* that the federal courts have no power to decide for themselves the res judicata effect of a state judgment in a federal suit because 28 U.S.C. § 1738 requires a federal court to give the judgments of a state's courts "the same full faith and credit . . . as they have by law or usage in the courts of such State." See *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982); *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Intended as it was to protect the authority of state courts, section 1738 ought not prevent a federal court from giving a state judgment more effect in a federal suit than the courts of the state would give it in a state suit. See Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 Mich. L. Rev. 1723, 1736-39 (1968), and other references cited in *FDIC v. Kohlhardt*, 691 F.2d 245, 247 (6th Cir. 1982). A federal court does not undermine the authority of a state's courts when it holds that a state judgment bars a federal suit. Moreover, the federal courts have an interest independent of the states' in preventing someone from litigating in federal court a claim he could have made in state court under state law as part of a state-court suit that he brought previously. But whether or not section 1738 allows a federal court to give a state court's judgment a greater preclusive effect than the state courts themselves would give it (an unsettled question, see, e.g., Wright, The Law of Federal Courts 690-91 (4th ed. 1983)), the statute cannot be used to decide this case. The Illinois courts, although hospitable to claims of res judicata, see *Morris v. Union Oil Co.*, 96 Ill. App. 3d 148, 421 N.E.2d 278 (1981); *Baird & Warner, Inc. v. Addison Industrial Park, Inc.*, 70 Ill. App. 3d 59, 63-65, 387 N.E.2d 831, 837-39 (1979), have not spoken to the *Nash* issue and will never have occasion to do so, since no federal antitrust suit can be brought in a state court. The issue whether such a suit would be barred by res judicata therefore cannot arise. Section 1738 cannot be used to decide this case.

Another argument that could be made against *Nash* is that the federal courts' exclusive jurisdiction to enforce federal antitrust law must be based on a judgment that only federal judges can decide antitrust cases intelligent-

ly; if so, a plaintiff should not be coerced to bring his antitrust claim in state court under a state counterpart to the federal antitrust statutes. But the state attorney general in *Nash* was not coerced to sue in state court under state law first; he chose to do so. And similarly the plaintiffs in this case could have brought a federal antitrust suit at the same time as (or instead of) their state suit. Only strategy or misjudgment could have made them wait till a final judgment was entered in the state suit. Moreover, it unduly demeans state judges to say that they cannot administer antitrust principles intelligently. It is also inconsistent with the fact that states such as Illinois have adopted antitrust laws modeled on the federal laws, that the federal antitrust laws have not been held to preempt state antitrust law, as federal labor law, for example, has been held to preempt state labor law, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959), and that federal courts give preclusive effect to state court factfindings in antitrust cases. Furthermore, since the doctrine of exclusive federal court jurisdiction over federal antitrust suits can only be intended to benefit defendants (for plaintiffs are always better off having a choice of different courts in which to bring their claims), it would be anomalous to use the doctrine to make an antitrust defendant defend himself a second time against the same claim, based on a new legal theory.

Assuming the *Nash* case was—as we believe—correctly decided, the next question is whether it is distinguishable from this case. The fact that the plaintiffs here based their state court actions not on the Illinois Antitrust Act but on other provisions of Illinois law does not distinguish the cases. The plaintiffs could have included in their complaints a claim under the Illinois Antitrust Act and that is all that is necessary to bring res judicata into play. Otherwise a plaintiff could bring the same suit over again against the same defendant, simply changing legal theories. Our decision in *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, supra, bears on this point. It bars a plaintiff who has not joined his state law claims as pendent claims in a federal

suit from suing on them after a final judgment is entered in the federal suit. 657 F.2d at 945-46. Therefore if the Nash County Board of Education had sued the defendants in federal court under federal antitrust law, a subsequent state suit would (in this circuit at least) have been barred.

The Illinois Antitrust Act, however, unlike the state antitrust law in *Nash*, see 640 F.2d at 488, is not identically worded to the counterpart federal law. The court in *Nash* did not decide whether a difference in wording between the state and federal statutes would have changed its result. See id. at 490, 492. The question should be answered not in gross but with reference to the specific provisions of the state and federal statutes, read in light of the specific allegations of the complaint. If, applied to the particular case, the state and federal standards are the same, it should not matter that applied to some other case they might be different.

Section 3(2) of the Illinois Antitrust Act forbids conspiracies and other agreements to restrain trade "unreasonably." The Illinois Appellate Court has held that a boycott challenged under this section could never be held to be illegal per se; it would have to be evaluated under the Rule of Reason. *Blake v. H-F Group Multiple Listing Service*, 36 Ill. App. 3d 730, 743, 345 N.E.2d 18, 29 (1976). A conspiracy to fix prices or limit output is, however, illegal per se under the Illinois Antitrust Act, Ill. Rev. Stat. 1981, ch. 38, § 60-3(1); see *People ex rel. Scott v. College Hills Corp.*, 91 Ill. 2d 138, 151-53, 435 N.E. 2d 463, 469 (1982), as it is under section 1 of the Sherman Act, see, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 and n. 59 (1940). Although section 1 of the Sherman Act does not in words distinguish between boycotts and price-fixing conspiracies, in this circuit at least "boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se—for example price-fixing agreements." Recently this language from the second panel opinion in this case (706 F.2d at 1406) was quoted approvingly by another panel considering a boycott by another medical association. Wilk

v. American Medical Ass'n, 719 F.2d 207, 221 (7th Cir. 1983). It is a correct statement of the law of the circuit. See *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 787-90 (7th Cir. 1981) (en banc).

The complaint in the present case charges either a conspiracy to fix prices or limit output, a *per se* offense under federal as under Illinois law, or, more likely, a nonprice conspiracy to exclude rivals from a professional association, which under our precedents must be tested under the Rule of Reason—and the state law is again the same. Not only does the Illinois Antitrust Act make federal antitrust cases precedents in interpreting the Act, see Ill. Rev. Stat. 1981, ch. 38, ¶ 60-11, but the Illinois Supreme Court has indicated that the Rule of Reason has the same meaning under Illinois antitrust law as under federal antitrust law. See *People ex rel. Scott v. College Hills Corp.*, supra, 91 Ill. 2d at 154, 435 N.E.2d at 471-72, citing federal cases as authoritative on the meaning of the Rule of Reason in section 3(2) cases.

Thus, there is no more difference in liability standards between state and federal law in this case than there was in *Nash*. The only possible difference is in the remedy. If the plaintiffs prove a price-fixing or output-limiting conspiracy, they are entitled under Illinois law as under federal antitrust law to an automatic trebling of their damages. See Ill. Rev. Stat. 1981, ch. 38, § 60-7(2); Clayton Act, § 4, 15 U.S.C. § 15. But if they prove a violation just of the Rule of Reason, under federal law they would still be entitled to an automatic trebling of their damages but under the Illinois law applicable to such violations, "if it is shown that [the] violation was willful, the court may, in its discretion, increase the amount recovered as damages up to a total of 3 times the amount of actual damages." Ill. Rev. Stat. 1981, ch. 38, § 60-7(2).

This might be an important difference in another case, but it has no practical significance in this one. Although the plaintiffs are now asking for damages as well as an injunction against their exclusion from membership in the

Academy, it is doubtful that they had any objective in bringing this suit other than to get themselves admitted to membership. We cannot understand otherwise why their state-court suits, insofar as they challenged the denial of the plaintiffs' membership applications, were purely for injunctive relief, and why the plaintiffs did not at that time—seven years ago—either add a state antitrust count to their complaints or bring a federal antitrust suit. The state suits did seek damages, but only on the theory that the application forms which the plaintiffs had filled out were contracts that the Academy had broken by distributing a list of applicants with the plaintiffs' names on it. See 79 Ill. App. 3d at 751, 758-59, 398 N.E.2d at 1229, 1233-34. The plaintiffs did not seek any damages for being excluded from membership; their federal antitrust suit contains no reference to the facts underlying the breach of contract claim; and because they filed their antitrust suit more than four years after the alleged breach of contract, any attempt to tease an antitrust violation out of the alleged breach would be barred by the four-year federal antitrust statute of limitations. 15 U.S.C. § 15b.

The timing more than suggests that the plaintiffs do not care about treble damages. As busy and successful surgeons with staff privileges at several hospitals (four for Marrese, seven for Treister) they may not think they can prove any actual damages—the prerequisite for getting treble damages—from having been denied membership in the Academy. Although the exact nature of the Academy is unclear from the limited record before us, we know that it has no licensing function, that its meetings are open to nonmembers, and that Dr. Treister once gave an invited paper at a meeting of the Academy. And certainly when the plaintiffs first sued the Academy in 1976, damages resulting from their exclusion were not in their thinking; no such damages were alleged. A suit under the Illinois Antitrust Act would therefore have been a perfect substitute for a federal antitrust suit—even if the Illinois Act had contained no damages provision at all.

This is not a case like *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 274 (7th Cir. 1981), where the plaintiff alleged in his federal antitrust suit that the state court suit that the defendants had pleaded as res judicata was itself part of the unlawful conspiracy. Marrese and Treister had a full and fair opportunity to litigate their claims in their earlier suits. Cf. *Lee v. City of Peoria*, *supra*, 685 F.2d at 201. And although the application of res judicata often produces a harsh result, the result here is less harsh than in many other cases, such as *Harrington v. Vandalia-Butler Board of Educ.*, 649 F.2d 434, 437-40 (6th Cir. 1981). Harrington brought a Title VII discrimination suit against a municipal corporation, and won. She could have gotten damages in that suit if she had joined with her Title VII claim a claim under 42 U.S.C. § 1983, but she did not do so, because the law was clear that municipal corporations were immune from liability under section 1983. After the final judgment in the Title VII suit the Supreme Court abrogated municipal immunity, and Harrington then brought her section 1983 suit. It was held barred by res judicata. As a practical matter Harrington had less opportunity to pursue her 1983 claim at the time of her first suit than Marrese and Treister had to pursue their antitrust claims at the time of their initial suits, which they could have done either by adding a count under the Illinois Antitrust Act or by bringing a separate federal antitrust suit.

We turn to No. 81-2011, the Academy's appeal from the $10,000 fine for contempt of Judge Shadur's discovery order. The first question is whether the appeal brings up to us the validity of the discovery order. The panel that originally decided this appeal was unanimous that it did, see 692 F.2d at 1087-88 (majority opinion), 1096 (dissenting opinion); 706 F.2d at 1492-93, and we agree. If a party is willing to pay the price of being punished for contempt (or suffering an equivalent sanction such as dismissal of the complaint) if the validity of the order he has disobeyed is ultimately upheld, he can get immediate review of that order by appealing from the contempt judgment. *United*

States v. Ryan, 402 U.S. 530, 532-33 (1971); *Ryan v. Commissioner*, 517 F.2d 13, 19-20 (7th Cir. 1975); *Hanley v. James McHugh Construction Co.*, 419 F.2d 955, 957 (7th Cir. 1969). Cf. *National Utility Service, Inc. v. Northwestern Steel & Wire Serv., Inc.*, 426 F.2d 222 (7th Cir. 1970); *Hastings v. North East Independent School Dist.*, 615 F.2d 628, 631 (5th Cir. 1980). If the underlying order is invalidated, the contempt judgment falls with it. See *Hanley v. James McHugh Construction Co.*, *supra*, 419 F.2d at 956, 958; cf. *United States v. Ryan*, *supra*, 402 U.S. at 533.

Yet in apparent contradiction to the above, many decisions state that the validity of a contempt judgment is independent of the validity of the underlying order. See, e.g., *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922); *United States v. United Mine Workers*, 330 U.S. 258, 291-94 (1947); *Blockson & Co. v. Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978); *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1356 (5th Cir. 1978). "Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect." *Maness v. Meyers*, 419 U.S. 449, 458 (1975). Equally broad language appears in *Howat* and *United Mine Workers*.

The difference between the two lines of cases cannot be the difference between civil and criminal contempt, because both are lines of criminal contempt cases. An order adjudging a party in civil contempt is not even an appealable final order. *Fox v. Capital Co.*, 299 U.S. 105 (1936); Wright, The Law of Federal Courts 703 and n. 37 (4th ed. 1983). However, the two lines of cases can be reconciled by noting that in the cases where the validity of the underlying order was held not to be reviewable on appeal from the judgment of contempt, the order could have been appealed as of right directly, or otherwise reviewed other than by appeal from the contempt judgment. See *Hanley v. McHugh Construction Co.*, *supra*, 419 F.2d at 957; *United States v. Ryan*, *supra*, 402 U.S. at 532 n. 4; *Maness v. Meyers*, *supra*, 419 U.S. at 460;

Blackmon & Co. v. Marshall, *supra*, 582 F.2d at 1134; 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3537, at pp. 340-41 (1975).

In *United Mine Workers*, for example, the union that was punished for contempt had failed to move to dissolve the temporary restraining order that it disobeyed. See 330 U.S. at 290. Moreover, as soon as the temporary restraining order ripened into a preliminary injunction (as it did, see id. at 299), the union could have appealed as of right under 28 U.S.C. § 1292(a)(1). Discovery orders, however, are not appealable. See Wright, *supra*, at 550-51. The right to appellate review of a judgment for contempt of a discovery order is thus a safety valve in the final-judgment rule of 28 U.S.C. § 1291. In *United States v. Ryan*, *supra*, in holding that an order to comply with a subpoena was not appealable, the Supreme Court noted that "If, as [the person subpoenaed] claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him." 402 U.S. at 532. That is just what the Academy did in this case. The Court in *Ryan* explained in a footnote that its holding in earlier cases "that the claims there sought to be asserted were not open on review of petitioners' contempt convictions was based upon the availability of review of those claims at an earlier stage." *Id.* at 532 n. 4. The Academy could not have gotten review of the discovery order at any stage earlier than the judgment of contempt for disobeying it.

Although, as this case illustrates, discovery orders may impose heavy and irrecoverable costs on a party, to make every such order appealable as of right would lead to unacceptable delays in litigation. Confining the right to get appellate review of discovery orders to cases where the party against whom the order was directed cared enough to incur a sanction for contempt is a crude but serviceable method, well established in the case law, of identifying the most burdensome discovery orders and in effect waiving the finality requirement for them.

The validity of the discovery order that the Academy disobeyed is therefore properly before us. The next question is whether the order is invalid merely because, as we have just held, Judge Shadur should have dismissed the suit on res judicata grounds before the order was entered. Although we cannot find any authority on the precise question, probably because criminal contempt is a rarely imposed sanction for violation of a discovery order, we believe that the discovery order does fall with the underlying suit. You cannot (with exceptions not pertinent here) get discovery in the federal courts unless you have a pending lawsuit, and if it turns out that the lawsuit should not have been pending because it was barred at the outset by res judicata we think it follows logically and practically that the discovery order exceeded the judge's authority.

And, as we have noted, if the order is invalid the contempt judgment must be set aside. For this is not a case where the appellant bypassed the established procedure for getting appellate review of the order; there was no other procedure but to disobey the order and be held in contempt. The Academy was not held in contempt for "obstructive and disruptive courtroom conduct," as in *United States v. Seale*, 461 F.2d 345, 361 (7th Cir. 1972), or for having destroyed its files rather than produce them, or for otherwise having shown disrespect for the orderly processes of the law; then the punishment would not be for violating an order but for the manner of the violation. Nothing of that sort is involved. The Academy, not in a provocative manner, disobeyed the discovery order because of a reasonable, and as it has turned out a correct, belief that the order was invalid—invalid on the very ground (res judicata) designed to protect a defendant from being harassed by repetitious litigation—and because disobeying the order and being punished for the disobedience was the only way, and a proper way, that the Academy could get appellate review.

This is not to say that anyone who wants to get the merits of his suit reviewed by this court without waiting for a final judgment to be entered or an interlocutory appeal to be certified under 28 U.S.C.§ 1292(b) need only refuse to obey the first discovery order that the district judge issues in the case and then appeal from whatever (appealable) sanction the district judge imposes for the disobedience. We have not reviewed the district court's res judicata determination as part of our review of the appeal from the contempt judgment, but on review of an independent appeal (No. 83-2683) taken under section 1292(b).

We need not rest our decision in No. 81-2671 (contempt) entirely on our decision in No. 83-8046 (res judicata). The argument made in No. 81-2671 that whether or not the entire case should have been dismissed on res judicata grounds the contempt judgment should be reversed because the discovery order violated Rule 26 of the Federal Rules of Civil Procedure has been fully briefed and argued to us, was discussed at length in both panel decisions, and is ripe for decision.

Rule 37(a)(2), authorizing discovery orders, must be read in light of Rule 26(c), which empowers the district court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that discovery not be had . . . ." and Rule 37(d), which empowers the court, "upon motion, for the convenience of parties and witnesses and in the interests of justice," to control the sequence and timing of discovery. Of course the effective management of complex litigation requires that the district judge be allowed a broad discretion in guiding the discovery process, *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981), and hence in deciding whether to limit discovery in accordance with Rules 26(c) or (d). But his discretion is not unlimited; if we have a firm conviction that he has made a mistake, we must reverse. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977). This was the test suggested by Justice Stewart, in his opinion dissenting from the second panel

decision, for reviewing the discovery order in this case. See 706 F.2d at 1498.

A motion under Rule 26(c) to limit discovery requires the district judge to compare the hardship to the party against whom discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery if discovery is denied. He must consider the nature of the hardship as well as its magnitude and thus give more weight to interests that have a distinctively social value than to purely private interests; and he must consider the possibility of reconciling the competing interests through a carefully crafted protective order. He must go through the same analysis under Rule 26(d) except that an order merely postponing a particular discovery request obviously should be granted more freely than one denying the request altogether.

In an effort to show that more than purely private interests are at stake the Academy argues that its membership files are protected by the First Amendment. If meant to establish a complete immunity from pretrial discovery of these materials the argument is untenable in light of *Memorial Hospital for McHenry Cty. v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) (per curiam), which rejected a claim of privilege for a hospital's records of disciplinary proceedings against staff physicians. Even if the Academy were engaged in advocating controversial views and the publication of its internal files would expose members to retaliation for those views, it would not have an absolute privilege against discovery, though the plaintiffs would then have the burden of showing that the information sought was essential to their case and unobtainable by other means that would be less likely to discourage such advocacy. *See Hastings v. North East Independent School Dist.*, *supra*, 615 F.2d at 632; *In re Petroleum Prods. Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982); *Gray v. Board of Educ.*, 692 F.2d 901, 905-06 (2d Cir. 1982).

Yet there is in this case, if not a First Amendment right, at least a First Amendment interest, which the dis-

covery sought by the plaintiffs would impair and which differentiates this case from the usual antitrust case, where discovery is sought of invoices or salesmen's reports or the minutes of a board of directors' meeting. In *NAACP v. Alabama*, 357 U.S. 449 (1958), a case involving resistance to pretrial discovery of membership lists, the Supreme Court recognized a First Amendment right of association for the purpose of expressing ideas. The American Academy of Orthopaedic Surgeons is not the NAACP, but neither is it a country club or a trade association; it is a professional association and a forum for exchanges of information about surgical techniques and related matters of substantial public interest. We do not understand the plaintiffs to be contesting the Academy's self-description in one of its pleadings in this case: "a professional society of board certified surgeons which exists for the purposes of encouraging research in the medical specialty of orthopaedics, and of sponsoring educational programs relating to the field of orthopaedic surgery which may be of interest to physicians." If the Academy has to reveal its membership files, members may be reluctant to offer candid evaluations of applicants, and the atmosphere of mutual confidence that encourages a free exchange of ideas will be eroded.

The Constitution to one side, one does not have to be a student of Aristotle and de Tocqueville to know that voluntary associations are important to many people, Americans in particular, and that voluntary professional associations are important to American professionals (the premise of the plaintiffs' antitrust suit, as it was of their Illinois suits). Since an association would not be genuinely voluntary if the members were not allowed to consider applications for new members in confidence, the involuntary disclosure of deliberations on membership applications cannot but undermine the voluntary character of an association and therefore harm worthy interests, whether or not those interests derive any additional dignity from the First Amendment. The threat to such interests is more than speculative in this case. Dr. Marrese's counsel said

at the rehearing en banc that he wants to use the membership files as a source of names of Academy members to depose in an effort to find out the motives behind their opposition to his client's application. It is hard to believe that after members of the Academy find themselves deposed for this purpose they will still be willing to offer candid evaluations of prospective members.

The other side of the coin is that barring the plaintiffs or their counsel from all access to the membership files would probably make it impossible for them to prove their antitrust case. But there were various devices that the district judge could have used to reconcile the parties' competing needs. For example, he could have examined the membership files himself *in camera*, a procedure described by the Supreme Court in a related context as "a relatively costless and eminently worthwhile method to insure that the balance between petitioners' claims of irrelevance and privilege and plaintiffs' asserted need for the documents is correctly struck." *Kerr v. United States District Court*, 426 U.S. 394, 405 (1976). We are told the membership files may be voluminous. No doubt the files in *all* cases between 1970 and 1980 where applications for membership in the Academy were refused are voluminous, but the place to start an *in camera* examination would be with the files on Drs. Marrese and Treister. If the judge found no evidence in those files of any anticompetitive purpose attributable to the Academy, he would not have to look at any other files. This is not a class action; the plaintiffs are not suing as the representatives of other orthopaedic surgeons who have been denied membership in the Academy.

Better yet, the judge might have followed the procedure discussed in this court's recent decision in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 338-39 (7th Cir. 1983). There we ordered the files of faculty tenure deliberations edited ("redacted") to remove the names of the deliberating faculty members and any other information that might enable them to be identified, and we directed that on remand the redaction be reviewed *in*

camera by the district judge, who would have the originals before him to compare with (and thereby assure the accuracy of) the redactions. Had the same procedure been followed here, the plaintiffs' counsel would have been able to read the files personally. If the files had turned out to contain evidence or leads to evidence of anti-competitive conduct, the plaintiffs' counsel could then have requested the judge to order names revealed to counsel so that the relevant individuals could be deposed. We do not think that only universities should be entitled to such consideration.

The protective order that the judge did enter ("which draws on each party's submission but parallels neither," in his words) was not well designed to protect the privacy of the Academy's members. It not only allowed the plaintiffs themselves—two disappointed applicants for membership—to read the files on their own applications; it allowed the plaintiffs' counsel "to discuss with plaintiffs the general contents" of all of the other files and to depose anyone whose name they found in the files. The order was not calculated to allay the Academy's justifiable anxiety for the confidentiality of its membership deliberations.

Rule 26(d) (control of the sequence and timing of discovery) provided another method of accommodating the competing interests here with minimal damage to either. If there is other discovery that a plaintiff must complete in order to able to resist a motion by the defendant for summary judgment, and thus a significant probability that his case will fail regardless of what the internal files he is seeking may show, the district judge has the power under Rule 26(d) to require the plaintiff to complete the other, nonsensitive discovery first. See 8 Wright, Miller & Cooper, Federal Practice and Procedure §§ 2040, 2047 (1976). And in an appropriate case he has the duty. "As a threshold matter, the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition. In this case, plaintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery." *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980). Cf. *McBride v. Merrell Dow & Pharmaceuticals Inc.*, 717 F.2d 1460, 1467 (D.C. Cir. 1983).

Of course, if the plaintiffs do not need anything beyond the contents of the Academy's membership files to prove their case, they cannot be asked to do any other discovery before getting access to the files. At oral argument we asked Dr. Marrese's counsel whether his discovery would be complete after he saw the membership files and followed up any leads the files contained. He answered that at that point he would file a motion for summary judgment arguing that the Academy had committed a per se violation of the Sherman Act, but that if the motion was denied he would conduct additional discovery, which he admitted would be necessary to prove a Rule of Reason violation. It is unlikely that the district judge would allow him to proceed in so piecemeal a fashion. The judge probably would tell him to complete discovery before moving for summary judgment. See 10 Wright, Miller & Kane, Federal Practice and Procedure § 2717 at p. 666 (1983). Assuming discovery would not be at an end when the files were turned over and any leads contained in them were tracked down, Rule 26(d) could have been used to schedule the sensitive discovery last.

We do not hold that all files of all voluntary associations are sacrosanct; we do not even hold that the membership files of an association of medical professionals are sacrosanct. They are discoverable in appropriate circumstances, subject to appropriate safeguards. But we may not ignore as judges what we know as lawyers—that discovery of sensitive documents is sometimes sought not to gather evidence that will help the party seeking discovery to prevail on the merits of his case but to coerce his opponent to settle regardless of the merits rather than have to produce the documents. In a survey of Chicago lawyers, "Several lawyers reported using discovery to try to 'move' cases toward settlement. For some attorneys this

meant little more than trying to pick a propitious moment to serve a major discovery request, hoping that an opponent would rather settle than respond. *For others it meant asking for information about which they knew opposing parties were particularly sensitive* or using a deposition to 'educate' an opponent about the weaknesses of his case or the cost of litigation." Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 A.B.F. Res. J. 789, 858 (emphasis added). (Of course the problem is not limited to Chicago!) "Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy." Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 288 (1980).

Many other judges and commentators have voiced concern over the use of discovery to force settlement in groundless cases. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975); *Herbert v. Lando*, 441 U.S. 153, 176 (1979); *ACF Industries, Inc. v. EEOC*, 439 U.S. 1081 (1979) (Powell, Stewart, and Rehnquist, JJ., dissenting from denial of certiorari); Cohn, *Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules*, 63 Minn. L. Rev. 253, 255-56 (1979); Kaminsky, *Proposed Federal Discovery Rules for Complex Litigation*, 48 Fordham L. Rev. 907, 922 (1980); Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264 (1979); Setear, The Sources and Reform of Discovery Abuse 5-6 (Wkg. Paper No. 11, Center for Studies in Law, Economics & Pub. Policy, Yale Law School, June 1983); Comment, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 Yale L.J. 352 (1982). There is at least a hint of predatory discovery in this case in the fact that the plaintiffs did not seek access to the federal court system with its liberal discovery rules till after they had lost their state-court suit, and in the determination expressed by Dr. Marrese's

counsel to use the Academy's membership files as the basis for deposing the individuals who voted against his client's membership application.

There are so many ways in which Judge Shadur could have prevented the plaintiffs from abusing the discovery process, without denying them any information essential to developing their case, that we are left with the firm conviction that the discovery order he issued, when he issued it, was erroneous. Our conclusion is consistent with the evolving concept of the district judge's managerial responsibility in complex litigation. Although amended Fed. R. Civ. P. 26(b)(1), which expands that responsibility, did not take effect until August 1, 1983, after the discovery order in issue here was issued, the Advisory Committee's Note indicates that the purpose of the amended rule is in part to remind federal district judges of their broad powers—and, we believe, correlative responsibilities—under Rule 26.

This case illustrates the pathological delays that are all too frequent in modern litigation. After nearly eight years of state and federal litigation, the case remains stalled in the earliest stages of discovery. It has gone on long enough. In No. 81-2671, the contempt judgment is reversed with directions to dismiss the contempt proceeding. In No. 83-2683, the order denying the defendant's motion to dismiss the underlying suit is reversed with directions to grant the motion and dismiss the complaint with prejudice.

BAUER, *Circuit Judge*, concurring. I concur in the result. Moreover, if I thought it necessary I would approve that portion of the opinion which holds the discovery order invalid. It is, however, sufficient, in my opinion, to rule that the complaint should have been dismissed on *res judicata* grounds.

ESCHBACH, *Circuit Judge*, concurring in part and dissenting in part. For the reasons expressed in the majority opinion, I agree that the discovery order constituted an abuse of discretion. I therefore concur in the judgment in No. 81-2671. Because I cannot agree that res judicata bars the federal antitrust claims, however, I respectfully dissent in No. 83-2683.

Judge Cudahy recites, as Justice Stewart did before him, an impressive array of authorities contrary to the majority's holding that res judicata bars the plaintiffs' case. *See, e.g., Hayes v. Solomon*, 597 F.2d 958, 984 n.19 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Kurek v. Pleasure Driveway and Park District of Peoria*, 583 F.2d 376, 379 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Restatement (Second) of Judgments* § 26(1)(c) comment c, illustration 2 (1982). Moreover, the majority's primary source of support, *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981), is clearly distinguishable in that it involved an attempt to relitigate an antitrust claim. Notwithstanding the force of Judge Posner's opinion, therefore, I would adhere to the precedents and affirm the order in No. 83-2683.

FLAUM, *Circuit Judge*, concurring in part and dissenting in part. I agree with Judge Posner that this suit should be dismissed under the doctrine of res judicata, but I arrive at this position through a different analysis. Judge Posner fits his result into the existing strictures of res judicata doctrine by finding that the plaintiffs could have brought their entire cause of action in one court. I would hold instead that in finding this suit barred by res judicata, it is unnecessary to find that the plaintiffs could have brought all their claims in one court, as long as they could have brought all their claims contemporaneously in different courts. We should treat this matter as we would any other case in which the plaintiff litigates a dispute under one theory, loses, and then brings a second suit to litigate the same dispute under a different

theory.[1] In such a situation, absent equitable circumstances not present here, fairness to a defendant requires that the second suit be barred by res judicata.

The basic principles of res judicata were stated recently by this court in the case of *Mandarino v. Pollard*, No. 82-3109 (7th Cir. Oct. 7, 1983):

> "The doctrine of res judicata is that a final judgment on the merits in a court of competent jurisdiction bars the same parties or their privies from relitigating not only the issues which were in fact raised and decided but also all other issues which could have been raised in the prior action. . . . The essential elements of the doctrine are generally stated to be: (1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits."

Slip op. at 6 (quoting *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982)). In the present case, the res judicata controversy revolves around whether there is an identity of the cause of action and whether the issues in the present suit should and could have been raised earlier.

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[1] Although Dr. Marrese's state court suit was not actually dismissed until after his federal suit was filed, it appears from the record before us that it was effectively defunct before his federal suit was filed. Once Dr. Treister's suit went to the Illinois Appellate Court on appeal, Dr. Marrese's suit, which raised identical issues, was stayed by the circuit court pending Dr. Treister's appeal. The Illinois Appellate Court affirmed the dismissal of Dr. Treister's complaint for failure to state a cause of action in October of 1979, and shortly thereafter the Illinois Supreme Court denied Dr. Treister's petition for leave to appeal. Following this denial, on March 21, 1980, both Dr. Marrese and Dr. Treister filed this action in federal court. I find nothing in the record indicating the reason that Dr. Marrese's suit was not dismissed following the dismissal of Dr. Treister's identical suit. In the absence of contrary evidence, there is a compelling inference that Dr. Marrese expected that his state suit would be dismissed at the time he filed his federal suit.

As a threshold matter, there is a question about which body of res judicata law should be applied here. As Judge Cudahy points out, there is language in the Supreme Court case of *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), that suggests that when a federal court determines the preclusive effect of an earlier state judgment, it always must follow the res judicata rules of the state from which the judgment is taken. ("It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments." *Id.* at 481-82). However, the Supreme Court in *Kremer* did not hold that a federal court may not give a state court judgment *greater* preclusive effect than the courts of that state would give it.[2] As Judge Posner notes, there is no reason for such a holding. In *Kremer* itself, the Court stated that Congress's purpose in enacting section 1738 was "specifically to insure that federal courts . . . would be bound by state judgments." *Id.* at 484 n.24. *See also Davis v. Davis*, 305 U.S. 32, 40 (1938). The requirement that the federal courts give the same credit to state court judgments as would the courts of that state thus can be interpreted as a convenient means to ensure that state judgments are given full credit; it is not an end in itself. Therefore, I agree with Judge Posner that we are not constrained by section 1738 as long as we do not give a state court judgment less preclusive effect than would the courts of the state from which the judgment is taken.

Though we are not bound by Illinois law, the Illinois courts have stated traditional res judicata principles that

[2] In *Kremer*, the Court stated: "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Kremer v. Chemical Construction Corp.*, 456 U.S. at 482 (quoting *Allen v. McCurry*, 449 U.S. 90, 96 (1980)). However, the Court did not state that federal courts must refuse to give preclusive effect to state-court judgments when the courts of the state from which the judgments emerged would so refuse.

are applicable to the facts of this case. Under Illinois law, a cause of action for purposes of res judicata is defined as follows:

> [A] cause of action consists of a single core of operative facts which give the plaintiff a right to seek redress for the wrong concerned. Even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action.

Morris v. Union Oil Co. of California, 96 Ill. App. 3d 148, 157, 421 N.E.2d 278, 285 (1981), *quoted in Lee v. City of Peoria*, 685 F.2d at 200. *See also Gasbarra v. Park-Ohio Industries*, 655 F.2d 119, 121 (7th Cir. 1981) (courts have sought to discover "whether the entire amount claimed to be due plaintiff arises out of one and the same act or contract") (quoting *Freeman & Co. v. Regan Co.*, 332 Ill. App. 637, 645, 76 N.E.2d 514, 517-18 (1947)). The Illinois courts also have stated that plaintiffs are required to set out in their pleadings all grounds for recovery that they may have. They may not maintain a subsequent suit after the loss of an earlier one based upon the same facts by the simple expediency of limiting the theories of recovery advanced in the pleadings of the first. *Baird & Warner v. Addison Industrial Park*, 70 Ill. App. 3d 59, 64, 387 N.E.2d 831, 837 (1979); *Prochotsky v. Union Central Life Insurance*, 2 Ill. App. 3d 354, 356, 276 N.E.2d 388, 390 (1971). These rules are founded upon "the plainest and most substantial justice, that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of suits." *Baird & Warner v. Addison Industrial Park*, 70 Ill. App. 3d at 64, 387 N.E.2d at 837. *See also Dorland v. Steinbrecher*, 50 Ill. App. 2d 344, 347, 200 N.E.2d 424, 425 (1964).

As a matter of federal law, the plaintiffs' earlier state court suits and their current federal suit should be considered to involve the same cause of action for purposes of res judicata. In each suit, the plaintiffs essentially were challenging the legality of the defendant's admissions pro-

cedures. In the state suits, their position was based on the theory that the procedures were in violation of state common law and due process. In their federal suit, they have claimed that the procedures amount to a group boycott, in violation of federal antitrust law. The state and federal suits revolve around the same set of operative facts: the facts relating to the manner in which the defendant has chosen to limit its membership. In short, the suits are so closely related that logic dictates that the principles of res judicata should be applied to them.

This pragmatic approach to identifying a cause of action has significant support in both the law and legal literature. The Restatement (Second) of Judgments, which uses the terms "cause of action" and "claim" interchangeably, states:

> [T]he concept of a transaction . . . connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes.
>
> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights.[3]

[3] As Judge Cudahy notes, there is some authority in Illinois law for a similarity of evidence test to determine identity of causes of action. However, Illinois courts have explicitly stated that this is only one test that can be employed for this purpose. *See LaGrange Federal Savings and Loan Association v. Rock River Corp.*, 97 Ill. App. 3d 712, 715, 423 N.E.2d 496, 500 (1981); *Rotogravure Service, Inc. v. R. W. Borroudale Co.*, 77 Ill. App. 3d 518, 525, 395 N.E.2d 1143, 1148 (1978).

Restatement (Second) of Judgments § 24 comments a and b (1980). Professor Currie, cited by Judge Posner, has also suggested a pragmatic approach to the application of res judicata, one in which the "cause of action" terminology would be unnecessary: "Perhaps the time has come . . . to ask simply whether the party to be precluded had adequate opportunity to litigate the matter in the earlier proceeding and whether the matter is closely enough related to the original controversy so that judicial economy would be served by confining litigation to one proceeding." Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 342 (1978).[4] Finally, and most importantly, it should be noted that this circuit has previously adopted a pragmatic approach to determining what constitutes a cause of action. *See Himel v. Continental Illinois National Bank*, 596 F.2d 205, 209 (7th Cir. 1979) ("primary test for determining if two suits are premised on the same cause of action is whether both suits arise under the same factual situation"), *quoted in Gasbarra v. Park-Ohio, Inc.*, 655 F.2d at 121. *See also Lambert v. Conrad*, 536 F.2d 1183, 1186 (7th Cir. 1976) ("[s]ince both suits pertain to the same disputed facts and arise out of the same operative facts, they clearly are the same cause of action").

Having determined that the suits at issue here involved identical causes of action for purposes of the res judicata doctrine, the question now becomes whether the substance of the present suit could have been raised earlier. A basic tenet of the res judicata doctrine is that a party may not litigate a dispute and then, upon an unsuccessful disposition, revive the same cause of action with a new theory. This principle has been stated repeatedly by this and

[4] Professor Currie is correct in suggesting that the sometimes overly technical inquiry into whether two suits involve the same cause of action can obfuscate the more fundamental inquiry for purposes of res judicata: whether the suits are related in such a way that a final determination in one should bar litigation of the other.

other circuits. *See, e.g., Mandarino v. Pollard*, No. 82-3109 slip op. at 8 (7th Cir. Oct. 7, 1983); *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981); *Roach v. Teamsters Local Union No. 688*, 595 F.2d 446, 450 (8th Cir. 1979); *Astron Industrial Associates v. Chrysler Motors*, 405 F.2d 958, 961-62 (5th Cir. 1968); *Grace v. Grace*, 394 F.2d 127, 128 (2d Cir. 1968); *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific Railroad*, 380 F.2d 605, 608 (D.C. Cir. 1967).[5] The instance where a party does attempt to revive an unsuccessful cause of action with a new theory is a particularly compelling case for the application of res judicata principles because it is almost always avoidable and can involve significant inconvenience to a defendant. One of the primary purposes of the res judicata doctrine is to protect defendants from the expense and vexation attending multiple law suits. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Mandarino v. Pollard*, No. 82-3109 slip op. at 5. When a defendant is charged with wrongdoing, expends considerable resources to defend him or herself in court, and is awarded a final judgment, it is unfair to make that defendant then go through the whole process anew to defend the same actions that were attacked in the first suit. Yet this is a description of what the plaintiffs would have us sanction in this case.

If this is not a classic case of losing and trying again on a different theory, it is only because, as Judge Cudahy argues, the plaintiffs could not have brought their federal antitrust claim in state court. I agree with Judge Cudahy that this jurisdictional obstacle excuses the plaintiffs from

[5] This principle also has been stated as follows:

> Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adducing a different substantive law premise or ground. This does not constitute the presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred.

RESTATEMENT (SECOND) OF JUDGMENTS, § 25 comment d.

bringing their federal claim in state court with their state claims, but it cannot excuse their waiting until their state suits were lost—a period of more than three years—before bringing their federal action. Insofar as the jurisdictional competency rule relied on by Judge Cudahy requires only that plaintiffs raise those theories of recovery available to them in a particular court—a court of their own choosing—and allows them to raise other theories at any other time, it is a technical rule that is not well designed to serve the policies behind the doctrine of res judicata. I suggest that it is a better rule to require plaintiffs who are unable to bring their entire cause of action in the forum of their choice, such as the plaintiffs in this case, at least to bring their entire cause of action relatively contemporaneously, in order to avoid their having two successive "bites of the apple" at the expense of the defendant. In some cases plaintiffs may choose to bring their entire cause of action in federal court and attempt to have their state claims adjudicated under that court's pendent jurisdiction. In other cases plaintiffs may choose to split their cause of action between state and federal courts. Either course would be preferable to what the plaintiffs chose to do in the present case.

I do not suggest that requiring plaintiffs to bring their entire cause of action within a reasonable period of time would necessarily advance the interests of judicial economy, though I am satisfied that such a requirement would not increase the total volume of litigation.[6] This equitable

[6] Of course, the requirement that is proposed may appear to be inefficient in a particular case where a plaintiff brings two contemporaneous suits and only one proves to be necessary to win a judgment. However, the same observation can be made about the res judicata doctrine generally, since it requires plaintiffs to present all possible theories of recovery when they may not all be necessary. That the res judicata doctrine is thought to promote judicial economy, *see Montana v. United States*, 440 U.S. 147, 153 (1979), reflects the belief that in the long run it is more efficient to consolidate closely-related matters at an early stage rather than run

(Footnote continued on following page)

requirement is simply one that is fair to defendants and at the same time poses no undue hardship on plaintiffs.[7] While this position represents an extension of the more confined and dated interpretations of res judicata,[8] it is in greater compliance with the spirit of the res judicata doctrine than are the more rote approaches. As the Supreme Court has stated, "[The] doctrine of res judicata is not a mere matter of practice or procedure inherited

[6] *continued*
the risk of litigating each one separately over a long period of time. This belief seems equally relevant to the situation in the instant case. Moreover, requiring plaintiffs to bring their entire cause of action at approximately the same time would seem to promote judicial economy insofar as it creates some incentive for plaintiffs in cases such as this to bring their entire cause of action in federal court. In addition, to the extent that some plaintiffs still may wish to split their cause of action, requiring them to split it contemporaneously rather than successively allows for some flexibility at the trial level that may reduce the amount of unnecessary litigation. For example, under certain circumstances an Illinois trial judge may dismiss a suit if there is another action between the same parties for the same cause pending in a different court, including a federal court. *See* 2-619(a)(3) of the Illinois Code of Civil Procedure (Ill. Rev. Stat., 1982, ch. 110, par. 2-619(a)(3)); *Slotwick v. Martin*, 32 Ill. 2d 55, 203 N.E.2d 428 (1964). Similarly, in some situations the federal court may see fit to stay its proceedings under a doctrine of abstention. *See* 17 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §§ 4241-4248 (1978).

[7] I recognize that a plaintiff may have theories of recovery under state law that are less complex than his or her exclusively federal theories. In such a situation, a plaintiff may still proceed in federal court. Pendent jurisdiction could allow the plaintiff to litigate one or more of the state claims before others if a district judge is satisfied that such priority should be given.

[8] It is worth emphasizing that this interpretation of the res judicata doctrine is limited to those cases in which one or more of the plaintiff's grounds for recovery can be litigated only in federal court, such as cases involving the federal antitrust laws. Where no such jurisdictional obstacle exists, it is already well settled that the plaintiff's entire cause of action must be brought contemporaneously, and in one court. *See* RESTATEMENT (SECOND) OF JUDGMENTS, § 25.

from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace,' which should be cordially regarded and enforced by the courts. . . ." *Federal Department Stores v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). In this case, because the plaintiffs had an opportunity to litigate their federal antitrust claim in a court of competent jurisdiction and failed to do so until their other legal theories failed, they now should be equitably barred from bringing a federal antitrust suit.[9]

Because I find the plaintiffs' suit barred by res judicata, I deem it unnecessary and inappropriate to reach the discovery question raised in this case. It is essential, however, that the contempt issue be addressed. On that question, I agree with Judge Wood that the contempt citation should remain intact apart from the fact that the plaintiffs' suit has been barred by res judicata, and I join that portion of Judge Wood's opinion dealing with the viability of the contempt citation.

[9] Although the fact that a plaintiff has actually lost an earlier suit involving the same cause of action should ordinarily be sufficient reason to invoke the res judicata doctrine, it is not essential that this occur. For purposes of applying res judicata, it may well be enough that a plaintiff has waited until the early stages of litigation are over in one suit before bringing the other, or that an unreasonable period of time has passed between the filing of the first and second suits. The reasonableness of the plaintiff's actions in a particular case should be a matter left to the sound discretion of the trial court that is being asked to bar the second suit on the basis of the res judicata doctrine.

WOOD, *Circuit Judge*, with whom CUMMINGS, *Chief Judge*, and CUDAHY, *Circuit Judge*, join, dissenting. Judge Posner's opinion has eliminated some points which appeared in the two prior opinions in this case, now vacated, and has added some new points. In certain respects the changes make this latest version less objectionable, but I respectfully must dissent. Those two prior opinions created the impression that this court was trying the case on its antitrust merits before the case had much of a chance to get started in the trial court. That prejudgment pall still hangs heavy over Judge Posner's latest opinion. Judge Cudahy's opinion, with which I fully agree, addresses the res judicata issue. I discuss the discovery and contempt issue in this dissent to the discovery portion of Judge Posner's opinion. Perhaps we could have simply adopted Justice Stewart's dissents from the vacated panel decisions, but as this latest opinion has developed, we believe some elaboration is necessary.

First, a review of some basis discovery principles is in order. A criminal contempt citation is a final judgment subject to full rights of appeal. *United States v. Ryan*, 402 U.S. 530, 532 (1971); *Union Tool Co. v. Wilson*, 259 U.S. 107, 111 (1922). Appellate review of a criminal contempt judgment for failure to comply with a discovery order may be used to test the propriety of the underlying discovery order, which is not otherwise appealable. *Ryan*, 402 U.S. at 532; *Hanley v. James McHugh Construction Co.*, 419 F.2d 955, 957 (7th Cir. 1969). The trial judge has wide discretion in shaping pretrial discovery. *Matter of Rasvi*, 701 F.2d 627, 631 (7th Cir. 1983). Reversal of a discovery order is appropriate only upon a clear showing of abuse of discretion. *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

When a party objects to discovery of confidential information, the trial court must weigh the interests of the parties and of public policy to arrive at an appropriate discovery compromise. *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061-62 (7th Cir. 1981)

(per curiam); *Keyes*, 552 F.2d at 581. Generally, broad discovery is available under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(1). Privileges excluding relevant evidence are construed narrowly because they constrict the fact-finding process. *Ryan v. Commissioner of Internal Revenue*, 568 F.2d 531, 542-43 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). Further, in the antitrust area, there is a strong public policy interest in open competition and private enforcement of the antitrust laws. *Memorial Hospital*, 664 F.2d at 1062. With these principles forming the backdrop, we now turn to analysis of the discovery order in this case.

The Academy claims that the confidentiality of its files is necessary to preserve asserted first amendment interests in the candid review of applicants for membership. I agree with Judge Posner's opinion that a first amendment argument for complete immunity from discovery is untenable. The freedom of association is not a shield against antitrust regulation. *See, e.g., NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3425 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978); *American Medical Association v. FTC*, 638 F.2d 443, 451-52 (2d Cir. 1980), *aff'd by an equally divided court*, 455 U.S. 676 (1982). This court recently acknowledged that a privilege against any discovery of even partially privileged materials might serve as a shield to hide evidence of illegal behavior and impair the truth-seeking process. *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 337 (7th Cir. 1983).

In *Notre Dame*, which Judge Posner's opinion also cites, EEOC sought discovery of the University's tenure files to investigate an assistant professor's charge that he was denied tenure due to racial discrimination. This court recognized a qualified privilege against disclosure of the sources of documents in the University's tenure files, due to the critical role of confidential tenure review in the pursuit of academic excellence. Nevertheless, we sanctioned limited discovery using the technique of redaction of

names and other identifying information. Judge Posner's opinion in the present case seems to accord the Academy as much or more protection than we gave the University in *Notre Dame*. The opinion, however, admits that the exact nature of the Academy is unclear. When we recognized the qualified academic freedom privilege in *Notre Dame*, we knew what we were protecting. Adlai Stevenson long ago put it well:

> For the university is the archive of the Western mind; it is the keeper of the Western culture and the foundation of Western culture is freedom. Men may be born free; they cannot be born wise, and it is the duty of the university to make the free wise. The university is the guardian of our heritage, the teacher of our teachers. It is the dwelling place of the free mind.

Stevenson (G. & D. Darling eds. 1977).

Nothing akin to the qualified academic freedom privilege applies to the Academy. The Academy, the only organization for this profession that counts as members nearly all the orthopaedic surgeons in the United States, does not claim to license, certify, or police the profession. Indeed, membership in the Academy appears to be most conspicuous by its mere absence. Yet the Academy itself fluctuates on the importance of membership. When an anti-competitive group boycott is the topic, the Academy gives the impression that exclusion from its ranks is of little professional consequence. In support of this characterization, the Academy argues that one of its principal functions is to sponsor educational seminars to which even non-members are welcome. However, when discovery of its admissions files is the issue, the Academy views itself as much too important to allow its confidentiality to be disturbed.

Judge Posner's opinion, by bestowing on the Academy some new kind of privilege in the nature of a first amendment interest, seems to agree with the Academy that its files are almost sacrosanct. All variety of trade associations and other types of organizations, from civic clubs to country clubs, should rejoice in their improved status and newly-fashioned protection from troublesome inquiries. Individuals and agencies, however, who have legitimate antitrust, discrimination, and other claims against such organizations have little reason to rejoice.[1]

Rather than following the *Notre Dame* redaction model in a context not involving the academic freedom privilege, the district court chose to protect the confidentiality of Academy documents by ordering production of the unredacted files on rejected applicants for membership, but with restrictions on disclosure of the contents. Plaintiffs' attorneys were to be permitted to discuss with their clients only the general contents, without identifying sources, of the files on other disappointed applicants. The files were to be used solely for purposes of this litigation. In reaching the discovery compromise, the district court followed the path approved by this court in *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981) (per curiam).

An asserted freedom of association does not raise a privilege against all discovery in the early stages of antitrust litigation, but requires a balance of the interests in confidentiality and disclosure to reach a discovery compromise. The trial judge endeavored to achieve that balance

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[1] In response to this dissent, Judge Posner's opinion has been revised in an attempt to narrow the reach of its holding on discovery of membership files by limiting it to professional associations, and not even all of those. A narrower holding may be some improvement, but the mere statement that the holding is so limited does not make it so.

Judge Posner's opinion labels the Academy's confidentiality concerns, "if not a First Amendment right, at least a First Amendment interest." We now are left in considerable doubt about which associations may qualify as beneficiaries of this first amendment protection, and what criteria should be used to distinguish among them. As a result, we surely will see additional problems created. Therefore, the concerns expressed by this dissent remain valid.

by working with the parties. I believe that the discovery order reasonably protected the Academy's confidentiality interests to at least a minimum extent while granting plaintiffs access to information without which, both Judge Posner's opinion and the district court agree, they probably would be foreclosed from proving their case.

Judge Posner's opinion now finds fault in the district court's failure to incorporate other protective devices for resolving the discovery dispute, such as an in camera inspection of the Academy's files or production of a redacted version of the files. I, too, believe that the trial judge could have improved on his discovery order. First, he could have been well-served by taking a look in camera at the Academy files on plaintiffs to see whether the files contained what plaintiffs claimed to need so badly, and whether the Academy had good reason to fight so desperately to keep the files out of sight.

The Supreme Court has commended an in camera view of documents in a discovery dispute to insure the striking of a proper balance between the interests in confidentiality and disclosure. *Kerr v. United States District Court*, 426 U.S. 394, 405 (1976). Failure to make an in camera inspection, however, is not in itself an abuse of discretion. While the district court did not view the Academy's files, it apparently was aware that the state trial court had conducted an in camera inspection of the files in the earlier state court litigation between the same parties. After viewing the files, the state court ordered production over the Academy's objections. *Treister v. American Academy of Orthopaedic Surgeons*, 78 Ill. App. 3d 746, 748, 396 N.E.2d 1225, 1226 (1st Dist. 1979) (describing the trial court's action). Thus, one judge had viewed these materials and determined that the contents were relevant and disclosure was appropriate. We should not ignore the state court's first-hand determination. Further, the Academy has maintained that an in camera inspection would not improve the discovery order. In the Academy's view, as I understand it, an in camera inspection could lead to a discovery order which, even if including redaction of the

files, would be an abuse of discretion at this stage of the litigation.

The propriety of the district court's order to produce the unredacted files also must be considered in light of the surrounding circumstances. In the early stages of this litigation, plaintiffs expressed their willingness to accept a redacted version of the Academy's files, at least as the first phase of discovery. The Academy refused plaintiffs' early offer to enter a redaction agreement, and plaintiffs later rescinded the offer. Both sides submitted proposed protective orders to the district court; apparently neither provided for redaction.

The Academy's participation in later court proceedings suggested its general approval of the protective order as it was developing. However, the Academy meanwhile continued to press its effort to avoid any discovery of its files. At oral argument, counsel for Dr. Treister stated that his client now would accept a redaction order if this would not limit the right to seek sanctions against the Academy. The Academy's position at oral argument was that any disclosure of its files, even after excision of names and other identifying information, would enable plaintiffs to determine the source of comments, thereby chilling participation in the Academy's admissions process. The Academy steadfastly maintained that no modification of the district court's protective order would be acceptable to it, and any forced disclosure of confidential information prior to the establishment of a jury issue on antitrust injury would be an abuse of discretion. Although the Academy's stonewalling now has paid off, I do not find an abuse of discretion in the district court's failure to order redaction under these circumstances.

Judge Posner's opinion suggests that the district court should have used its Rule 26(d) powers to control the sequence of discovery in this case. Discovery usually may proceed in any sequence, but the court upon motion, for the convenience of parties and in the interests of justice, may schedule the order of discovery on different issues.

Fed. R. Civ. P. 26(d). Judge Posner's opinion correctly notes that the district court's power to order sequential discovery may rise to a duty in some cases, citing *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980), a reporter's privilege case. The present case does not begin to fit into the *Bruno & Stillman* mold. The interests in the confidentiality of the Academy's files do not require such delicate treatment as do those involved in the case of a reporter seeking to protect confidential news sources from discovery. The district court considered and rejected the Academy's motion to bifurcate discovery. The court was satisfied that plaintiffs' claim was not frivolous, having withstood a motion to dismiss once, and again upon reconsideration. The Academy's proposal for sequential discovery would have required piecemeal discovery, which the district court found would burden plaintiffs unnecessarily since the Academy's confidentiality interests could be preserved adequately through a protective order. I would hold that the district court did not abuse its discretion by refusing to order sequential discovery.

Judge Posner's opinion discusses the misuse of discovery tools to coerce settlement, and apparently concludes that the district court's discovery order failed to prevent plaintiffs from abusing the discovery process. The opinion finds two "hints" of predatory discovery here: first, that plaintiffs sought access to federal court—and its liberal discovery rules—only after losing in the state court; and further, that plaintiffs planned to use information from the Academy's files as the basis for further discovery. The first hint merely returns us to the res judicata issue in the context of a dual court system. The second hint, plaintiffs' plan to follow up leads found in the files, is one of the conventional purposes of discovery.

Upon questioning at oral argument, counsel for the Academy labeled plaintiffs' suit a "fishing expedition," an attempt to gain access to otherwise unavailable information. Under the circumstances, however, plaintiffs' pursuit of the files and plan to seek further discovery using leads

from the files [illegible] within the bounds of appropriate discovery. The discovery record in this case evidences not the slightest abuse, harassment, or coercion to pressure a settlement. Judicial concern about discovery abuse is always legitimate, but such arguments are gratuitous in the context of this case. The abuse of discovery here instead is the Academy's obstinate defiance of the trial court, which now is sanctioned by this court.

Although not condemning any one omission as an abuse of discretion, the discovery majority is left with the "firm conviction" that the district court's discovery order was erroneous. I am not. The district court sought and received proposed protective orders from the parties, and mediated negotiations on this issue. Bifurcation of discovery was not mandatory in this case, and the court reasonably provided for the Academy's confidentiality concerns through the protective order. The Academy should not now reap a windfall from reversal of the discovery order because the order did not incorporate certain provisions that the Academy still would refuse to accept. The Academy treated the trial judge's reasonable discovery order with contempt and its contempt should be recognized by this court.

The Academy further objects to the contempt penalty. It argues that the $10,000 fine invoked the right to a jury trial, and the court erred in not granting a jury trial on the contempt adjudication. The Academy also challenges the fine as excessive in view of the nature of the offense.

The right to a jury trial for a charge of criminal contempt arises when the penalty imposed exceeds what would be considered a petty offense under the statutory definition of federal criminal offenses. *Frank v. United States*, 395 U.S. 147 (1969); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966). A petty offense is any misdemeanor for which the penalty does not exceed six months' imprisonment or a $500 fine. 18 U.S.C. § 1(3). The $10,000 penalty against the Academy obviously exceeds the $500 limit for petty offenses, and was imposed without a jury trial.

Plaintiffs argue, however, that the Academy waived its right to a jury trial. The development of the contempt citation in this case convinces me that such a waiver did take place and that the amount of the fine was not an abuse of discretion. *See Shibley v. United States*, 236 F.2d 238, 240 (9th Cir.), *cert. denied*, 352 U.S. 873 (1956) (abuse of discretion standard of review); *Jewel Tea Co. v. Kraus*, 204 F.2d 549, 551 (7th Cir. 1953) (same).

In the presence of all parties, the district court and the Academy discussed possible avenues for the Academy to procure appellate review of the discovery order, after this court had dismissed an earlier appeal attempt for lack of jurisdiction. The Academy suggested that the court hold it in criminal contempt with a fine of $500, and waived issuance of a rule to show cause. Plaintiffs, desiring to coerce production, proposed a civil contempt citation with a daily $5,000 fine. A few days before entering the contempt order, the district court informed the parties of its intention to impose, as a compromise, a criminal contempt citation with a one-time $10,000 fine. After the district court informed the Academy of its draft order, the Academy did not object or attempt to rescind its waiver of a rule to show cause; nor did it assert its right to a jury trial. Rather, the Academy appeared willing to accept the citation and fine as the basis for an appeal to this court, and risk paying the price. It is now too late for the Academy to become parsimonious.

Judge Posner's opinion declines review of the contempt citation under a belief that the citation falls with reversal of the district court either on res judicata grounds or for abuse of discretion in shaping the discovery order. The status of a contempt citation after reversal of the underlying order is an issue independent of the propriety of reviewing the underlying order on appeal of the contempt citation. On the latter issue, which I have discussed above, I agree with Judge Posner's opinion that review of the underlying discovery order is appropriate here. On the former issue, however, the opinion cites yet overlooks precedent which supports sustaining the contempt order

despite reversal of the district court order on other grounds.

As Judge Posner's opinion notes, many decisions hold that a contempt citation remains intact even after invalidation of the underlying court order which was violated. *See, e.g., Maness v. Meyers*, 419 U.S. 449, 458 (1975); *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947). *See also Blocksom and Co. v. Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978) ("it is no defense to a charge of criminal contempt that the order disobeyed was invalid"). The Court in *United Mine Workers* concluded:

> [W]e find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly proceedings. This is true without regard for the constitutionality of the Act under which the order is issued. . . . Violations of an order are punishable as criminal contempt even though the order is set aside on appeal.

Id. at 293-94 (footnotes omitted).

The district court had both subject matter and personal jurisdiction in this action. Even if the action is barred by res judicata, this is not a jurisdictional deficiency; res judicata is an affirmative defense that may be pleaded and proved, or waived, by the party asserting it. *See, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971); *Church of the New Song v. Establishment of Religion on Taxpayers' Money in the Federal Bureau of Prisons*, 620 F.2d 648, 651 (7th Cir. 1980), *cert. denied*, 450 U.S. 929 (1981); Fed. R. Civ. P. 8(c). *See also* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4405 (1981). The criminal contempt citation against the Academy remains very much alive. The district court's jurisdiction was uncontested. The court entered a discovery order which the Academy chose to disobey. The Academy itself invited the contempt citation which has enabled it to perfect this appeal.

Although the discovery order could have been improved, the district court's fashioning of the terms was not an abuse of discretion under the circumstances of this case. What the merits of this case would have turned out to be, we now will never know; but we must not let a prejudgment on the merits cloud our review of the discovery order. Plaintiffs, their case not barred by res judicata, deserve the opportunity within reasonable limits to develop their case, and then the opportunity to try it before a judge and jury. I would affirm the district court's contempt holding, but on remand I would direct the court to view the Academy's files in camera and to consider possible redaction before actually enforcing the discovery order.[8] This opportunity to reconsider the discovery order would be a fairer disposition of this case, giving the Academy another chance to review its position on discovery without depriving plaintiffs of their chance to see if they can make out a case.

Judge Posner's opinion reaches the discovery issue despite its conclusion that the suit should be dismissed on res judicata grounds. The opinion directs that plaintiffs' complaint be dismissed with prejudice. That is a hard blow to strike, particularly when paving new ground in the res judicata area. I have no reservations about joining Judge Cudahy's opinion on the res judicata issue, and I respectfully dissent on the discovery and contempt issue.

[8] This is not to say that the trial judge abused his discretion in the manner in which he afforded protection to the Academy. I would affirm his discovery order. I suggest only that, in light of all the judicial discussion of the issue, the trial judge, before again attempting to enforce his discovery order, reconsider whether or not he could improve upon his original order after an in camera sampling of the files.

CUDAHY, *Circuit Judge*, with whom CUMMINGS, *Chief Judge*, and WOOD, *Circuit Judge*, join, dissenting. I join enthusiastically in Judge Wood's able dissent on the discovery branch of this case while, at the same time, I write separately in dissent principally on the plurality's[1] res judicata holding.

We are presented here with a Sherman Act claim against what may for present purposes be characterized as a dominant national trade association.[2] As Illinois Supreme Court Justice Seymour Simon, then of the Illinois Appellate Court, has said,

> [Dr. Treister] seeks admission to a prestigious medical society, not to a social, religious, or fraternal organization like an Elks Club . . . or the Order of the Eastern Star. . . . The Academy holds itself out as the sole legitimate organization of its kind in the profession, and is widely recognized as such. It is a monopoly; and it is affiliated with the A.M.A., itself a monopoly. . . . The Academy is more like a government than like a truly voluntary combination, and may justly be treated accordingly.

Treister v. American Academy of Orthopaedic Surgeons, 78 Ill. App. 3d 746, 759-67, 396 N.E.2d 1225, 1234, 1236, 1239 (1979) (Simon, J., dissenting).

When a large national organization with a membership including the vast majority of the board-certified orthopaedic surgeons of the country conducts its affairs, one may assume that its interests cover the gamut of economic, as well as medical, concerns of the membership.[3]

[1] The opinion authored by Judge Posner is a majority opinion on the validity of the discovery order but a plurality opinion with respect to the res judicata issue. Therefore, as the context requires, I shall variously refer to this opinion as the majority or plurality opinion.

[2] *See* note 5 *infra*.

[3] In 1978, the Academy entered into a consent decree with the Federal Trade Commission, prohibiting the Academy's further con-

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Whatever differences may otherwise exist, at least for antitrust purposes, the Academy seems comparable with other great national trade or professional associations such as the American Bar Association, the Cement Manufacturers Protective Association[4] and the American Iron and Steel Institute.[5]

I wonder whether the majority would extend the solicitude which it feels for the secret files of the Academy if one of these other trade associations were the defendant. I see no reason why the principles announced here would not apply equally to such a case. I believe the Academy is more like the American Iron and Steel Institute—both organizations are comprised of the practitioners of a particular trade, business or profession (who are potential competitors)—than the Academy is like the National Association for the Advancement of Colored People. Yet the majority discusses *NAACP v. Alabama*, 357 U.S. 449 (1958), as if it had significant bearing on the case at bar. *Supra*, at 18. The NAACP, like the John Birch Society, is an advocacy organization, having occupationally diverse members committed to the same (relatively controversial) ideas and causes. First amendment concerns with respect to such organizations are obvious. The members of the Academy, on the other hand, have in common, like other trade groups, their occupation, business

[5] *continued*
pilation or publication of "relative value scales" for pricing its members' services. (R. 86, pp. 2-3 and Reference Exhibit). The FTC apparently contended that this activity of the Academy constituted a form of price-fixing. 88 F.T.C. 966 (1976).

[4] *See generally Cement Manufacturers Protective Association v. United States*, 268 U.S. 588 (1925).

[5] The majority quarrels with my characterization of the Academy as a "trade association." As noted *infra*, it is certainly one, *prima facie*, since the membership is defined by the occupation of the members—orthopaedic surgery. What it is *exactly* cannot be known at this early stage of the proceedings. I do not question the Academy's commitment to superior medical care, professional enlightenment and education.

or profession. Like other such groups, the Academy presumably promotes the betterment and serves the occupational interests of its members.

The majority cites no case which recognizes any "interest" under the first amendment, or its penumbra, in secret proceedings of trade or professional associations. At oral argument, counsel for defendants indicated that the same secrecy interest belongs to all private organizations—including country clubs. I believe there are serious dangers in recognizing substantial rights to secrecy in organizations which bring together members of the same trade, occupation or profession, where no legal privilege exists. *Cf. Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981) (per curiam). When people who make their living in the same way join together—however exalted their purposes—it is the height of naivete to suggest that their association is without economic significance. Certainly the antitrust laws have never indulged in any such unrealistic assumption. As Justice Simon has said:

> The secrecy in which . . . associations [like the Academy] have historically cloaked themselves is therefore little proof of its value for legitimate purposes, and is open to sustained abuse. . . . [T]he power of groups like the Academy is so great, so self-perpetuating, so little checked by private forces, and has such potential for abuse, that the balance of interests favors judicial oversight.

78 Ill. App. 3d at 766, 396 N.E.2d at 1239 (Simon, J., dissenting). In this connection I note that our recent decision in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331, 340 (7th Cir. 1983), involving the confidentiality of peer review documents, specifically recognized a qualified academic freedom privilege.[6]

[6] At oral argument, counsel for the defendants expressly disclaimed any function of professional self-regulation (like peer review) for the Academy. Yet Justice Simon has said that "[t]he

(Footnote continued on following page)

The plurality, with Judge Flaum concurring, has, however, seen fit to dispose of this case not primarily on the basis of the right to secrecy but rather on grounds of res judicata. At least the plurality describes the grounds of its ruling as "res judicata" although the application here is hardly recognizable in terms of the well accepted principles of that doctrine. The plurality concedes that, as Justice Potter Stewart noted in his dissent from the first panel opinion, *Marrese v. American Academy of Orthopaedic Surgeons*, 692 F.2d 1083, 1099 (7th Cir. 1982) (Stewart, J. (Retired), dissenting), *reh'g granted and vacated* (1983), the overwhelming weight of authority is against it. *See, e.g., Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 274 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Hayes v. Solomon*, 597 F.2d 958, 984 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Kurek v. Pleasure Driveway & Park District of Peoria*, 583 F.2d 378, 379 (7th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 1060 (1979); *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759, 762 (2d Cir. 1968). The plurality opinion is in fact an aggressive *tour de force*—going well beyond existing law—in the abdication of federal jurisdiction.

Since the plurality opinion seems to take us so far from the *terra firma* of solid precedent and facts of record, let us first turn to fundamentals. An old and honored formulation of the res judicata defense in barring a subsequent suit is that "a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Southern Pacific Ry. Co. v. United States*, 168 U.S. 1, 48-49 (1897). *See also Montana v. United States*, 440 U.S. 147, 153-54 (1979). The plurality

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[6] *continued*
Academy functions largely as an informal accrediting body . . . . [T]he main advantage of membership appears to be the credential, the Academy's endorsement, relied on by others." 78 Ill. App. 3d at 765, 396 N.E.2d at 1238 (Simon, J., dissenting).

opinion, however, does away with the requirements that there be identity of causes of action and that the first judgment be rendered by a court jurisdictionally competent to hear the claim which is later held to be barred.

This is judicial activism in the service of judicial abdication. We are told, in effect, that state and federal courts are busy, and it will save everyone's time if the plaintiffs are refused the right to bring their Sherman Act claim in the only court which can hear it. It would surely save us even more time if the federal courts refused to hear all claims on the theory that the state courts could hear ones that are similar. With all respect, I am afraid we are simply refusing to do our job as federal judges in circumstances where the well-accepted rules plainly require us to do it.

In determining when to apply res judicata, the plurality opinion formulates a new "federal rule" that a federal court should give a prior state court judgment greater preclusive effect than would a state court. But the federal courts, in fact, are bound under the "full faith and credit" clause of the Constitution and 28 U.S.C. § 1738 to give the *same* res judicata effect to a prior state court judgment as would another court of that same state. In this situation, "more" is clearly not "better." The plurality does concede that a federal antitrust claim could not arise in state court and that therefore the outcome of such a scenario could not specifically decide the case before us. Nonetheless, because the plurality continues to advocate a "federal rule" which would be more preclusive than state practice, it is appropriate for me to address the reasons why a state law test should govern.

The plurality's new rule is contrary to section 1738 as well as to the purposes underlying "full faith and credit." As Justice White has written,

> [I]t has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and com-

> mands a federal court to accept the rules chosen by the State from which the judgment is taken.

Kremer v. Chemical Construction Corp., 456 U.S. 461, 481-82 (1982). This is the Court's understanding of Congress' intent and the *Kremer* holding reflects the plain command of section 1738.[7]

The plurality, however, argues that

> section 1738 ought not prevent a federal court from giving a state judgment *more* effect in a federal suit than the courts of the state would give it in a state suit; a federal court does not undermine the authority of a state's courts when it holds that a state judgment bars a federal suit. [emphasis in original]

Supra, at 7. Most of the authority cited by the plurality for this proposition does not specifically discuss this issue and predates the two recent Supreme Court decisions, *Kremer* and *Allen v. McCurry*, 449 U.S. 90 (1980), which do address the issue. The plurality also cites *Federal Deposit Insurance Corp. v. Eckhardt*, 691 F.2d 245 (6th Cir. 1982), which in fact holds that the preclusive effect of a prior judgment is determined by the law of the rendering forum (in that case, the state of Ohio). The Sixth Circuit emphasized the new trend supporting this holding, in stating, "the emerging rule is that the preclusive effect of a valid judgment is to be determined by the law of the system which rendered the judgment." *Id.* at 247. *See also General Foods Corp. v. Massachusetts Department of Public Health*, 648 F.2d 784 (1st Cir. 1981). A perceptive commentator has recently endorsed this modern trend:

> A different rule is emerging today, and an even stronger one will prevail in the future. It will read something like this:

[7] *See also Allen v. McCurry*, 449 U.S. 90, 96 (1980) (§ 1738 requires "all federal courts to give preclusive effect to state court judgments whenever the courts of the state from which the judgments emerged would do so. . .").

> *A valid judgment rendered in any judicial system within the United States must be recognized by all other judicial systems within the United States, and the claims and issues precluded by that judgment, and the parties bound thereby, are determined by the law of the system which rendered the judgment.*

Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 773 (1976) (emphasis in original).

In addition to the recent authority contradicting the plurality's proposed rule, there are important policy considerations which also militate against it. Deference to state courts is not the *only* value to be served by the res judicata doctrine. Even the commentator whom the plurality opinion cites approvingly recognizes that there are other values at stake when making a res judicata determination:

> [T]his reading of section 1738 [to allow greater preclusive effect] might offend state policies limiting the res judicata effect of judgments, and there may be due process problems in giving a judgment greater effect than the court entering it intended . . . .

Currie, *Res Judicata: the Neglected Defense*, 45 U. CHI. L. REV. 317, 327 (1978). The plurality has thus overlooked the policy interests of the rendering forum in predicting the preclusive effect of its own judgments. In addition, by rejecting the Illinois law of res judicata in the guise of improving upon it, the plurality has undermined the Illinois law to which it purports to defer.

The significance of section 1738 and its interpretation in *Kremer* is that a federal court, in determining the res judicata effect of a prior state court judgment, should apply the criteria of the state's res judicata law. It would be incorrect to limit the question strictly to the outcome of a federal antitrust claim in state court because, as the plurality concedes, such a suit would be dismissed for lack of jurisdiction. *Kremer* still dictates, however, that the

appropriate issue in the application of the principles of Illinois res judicata law to the current case.[8]

Illinois res judicata law thus requires that, in order to bar a subsequent claim which was not raised in the first suit, the first court must have had jurisdiction to hear the subsequent claim.

> The doctrine of res judicata provides that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. (*People v. Kidd* (1947), 398 Ill. 405, 408, 75 N.E.2d 851). [emphasis supplied]

Rotogravure Serv. v. R. W. Borrowdale Co., 77 Ill. App. 3d 518, 524, 395 N.E.2d 1143, 1148 (1978).[9] Apparently, no Illinois judge has questioned the jurisdictional competency rule; any departure from the rule has presumably been deemed so unfair and illogical as to require no discussion. Therefore, because the Illinois courts did not have jurisdiction to hear the plaintiffs' Sherman Act antitrust claim, the prior Illinois suit cannot bar the subsequent federal suit.

Turning from state law, I shall now examine the plurality's suggestion that the plaintiffs' federal antitrust claim, as a matter of *federal* law, should be barred in federal court because they should have brought either a federal or a state antitrust claim in state court simultaneously with their common law claims.[10] However, a federal antitrust claim brought in an Illinois court would certainly have been dismissed for lack of jurisdiction. The plurality laments the fact that federal courts have long asserted exclusive jurisdiction under the federal antitrust statutes. *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*,

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[8] Plaintiffs argue that an Illinois court would not bar a second suit based on the Illinois antitrust laws because Illinois courts employ a different test (based on similarity of evidence) to determine identity of causes of action. *See Village of Northbrook v. County of Cook*, 60 Ill. App. 3d 745, 750, 410 N.E.2d 925, 929 (1980); *Olave v. Olave*, 114 Ill. App. 3d 28, 448 N.E.2d 229, 232 (1983); *Hilti, Inc. v. Griffith*, 68 Ill. App. 3d 528, 532-33, 386 N.E.2d 63, 65 (1978); *Rotogravure Serv. v. R. W. Borrowdale Co.*, 77 Ill. App. 3d 518, 525, 395 N.E.2d 1143, 1149 (1978); Twister Supplemental Brief at 10-18. I do not believe it is necessary here to consider the outcome under this similarity of evidence theory of such a suit in state court because this determination is not necessary to the conclusion that plaintiffs' federal antitrust claim should not be barred in federal court. I note in passing, however, that in the decision cited by the plurality, *Federal Deposit Insurance Corp. v. Ehlenbrook*, 691 F.2d 345 (6th Cir. 1982), the Ohio res judicata law applied by the Sixth Circuit involves a test which is close to that suggested by the plaintiffs as appropriate in Illinois: the existence of "a single or two distinct causes of action for res judicata purposes [is determined by] 'whether different proofs are required to sustain the two actions. . . .'" *Id.* at 349 (quoting *Norwood v. McDonald*, 142 Ohio St. 299, 311, 52 N.E.2d 67, 73 (1943)).

Further, if plaintiffs had appended a state antitrust claim to their federal antitrust claim brought in federal court, the federal court would evaluate the federal claim under the plurality's new federal rule, while it would have to evaluate the state claim under Illinois res judicata law in accordance with the Rules of Decision Act, 28 U.S.C. § 1652, and the *Erie* doctrine. Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Court*, 66 MICH. L. REV. 1729, 1729-31 (1968). This analysis could then lead to the anomalous result that the federal claim was precluded by the state court judgment but the state claim was not.

[9] *See also Schmitt v. Woods*, 73 Ill. App. 3d 498, 499, 392 N.E.2d 55, 56 (1979); *Hilti, Inc. v. Griffith*, 68 Ill. App. 3d 528, 532, 386 N.E.2d 63, 65 (1978); *Kahler v. Don E. Williams Co.*, 59 Ill. App. 3d 716, 718, 375 N.E.2d 1034, 1036 (1978); and *National Tea Co. v. Confection Specialties, Inc.*, 48 Ill. App. 3d 650, 654, 362 N.E.2d 1150, 1153 (1977).

[10] The plurality says that the plaintiffs "waited till they had lost their state law suits and only then . . . did they bring suit." *Supra*, at 4. This is certainly not true of Dr. Marrese, whose state court action was not dismissed until approximately one year after the filing of the federal action. Marrese's Petition for Rehearing at 7. In the case of either plaintiff, however, it is unclear what aspect of judicial economy or fairness to the defendant would have been served by requiring even the simultaneous filing of both actions in state and federal courts.

252 U.S. 436, 440 (1920); *Kurek v. Pleasure Driveway & Park District*, 583 F.2d 378 (7th Cir. 1978). Ultimately, however, the plurality acknowledges that this court, even in the course of its more creative efforts at narrowing its own powers, must accept this rule as a given.[11]

[11] The plurality opinion refers to the preclusive effect of a prior state court adjudication of an antitrust *defense*, *supra*, at 5, in arguing that this court should adopt the same rules for an antitrust *claim*. Yet, in the decision which the plurality cites, *Lyons v. Westinghouse Electric Corp.*, 222 F.2d 184 (2d Cir. 1955), Judge Learned Hand refused to grant preclusive effect to a state court adjudication of such a defense. Judge Hand wrote:

> the grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that makes up the wrong.

Id. at 189. The *Lyons* decision is usually taken to stand for a principle precisely opposite to that for which the plurality cites it, namely, "that state court determination of a federal antitrust defense in a contract action could not become binding in federal antitrust litigation." 18 C. Wright, A. Miller, E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4470, at 693 n.23 (1981). *See also RX Data Corp. v. Department of Social Services*, 684 F.2d 192, 196-98 (2d Cir. 1982) (court declined to apply either res judicata or collateral estoppel when there was insufficient identity of issues, partly because state court could not have heard claim for copyright infringement).

The plurality also relies on Justice Holmes' decision in *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388 (1929), as authority for granting preclusive effect to a prior state court proceeding. In *Becher*, the federal suit involved a claim of patent infringement, while the prior state decision related to a breach of contract claim. Holmes held that the plaintiff was estopped to relitigate the state court's *findings of fact*, even though these facts might be dispositive of the patent claim. Exclusive federal jurisdiction over patents did not prevent the state court from determining facts relevant to the dispute before it:

> A fact is not prevented from being proved in [a state] case in which it is material, by the suggestion that if it is true an

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In his dissent from the first panel decision in this case, Justice Stewart observed that the federal common law of res judicata bars the relitigation of all those claims—but only those claims—which were *or could have been* brought in a prior litigation between the same parties arising from the same cause of action. As the Supreme Court said in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981):

[11] *continued*

> important patent is void—and . . . we can see no ground for giving less effect to proof of such a fact than to any other.

Id. at 391-92.

It is clear that the holding in *Becher* was limited to the preclusive effect of *findings of fact*. As the Sixth Circuit, in *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967), explained the *Becher* holding:

> Thus if the first suit is brought in a State Court, this will not mean necessarily that facts there proven can be contested subsequently in a Federal Court action, notwithstanding the exclusive jurisdiction of the Federal Court. However, the doctrine of collateral estoppel is not applicable in the instant case where there were no findings of fact and no adjudication of the case on its merits in the State Court action.

Id. at 362-63.

As the court in *Cream Top Creamery* stated, so in our case—there have been no *findings of fact* in the state court. The plurality concedes that the decision in *Lyons* is restricted to the preclusive effect of prior determinations of facts. Nonetheless, the plurality continues to rely heavily on the holdings in *Lyons* and *Becher* to support its argument that nonfactual issues should be precluded in the present case. Yet *Lyons* even refers to the distinction between individual facts and a group of operative facts involving the application of law. *See also Abramson v. Pennwood Investment Corp.*, 392 F.2d at 762 (complaint based on Securities Exchange Act § 10(b) and Rule 10b-5 not barred under res judicata by prior state court action based on claim of breach of fiduciary duty although plaintiff would be estopped to relitigate *facts* determined in prior proceeding). In the case before us, there have simply been no findings of fact to estop the plaintiffs in federal court, and the plurality's citations are not on point.

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1877).

Id. at 398.

By definition, the "could have been raised" standard necessarily entails the jurisdictional competency of the court that decided the prior litigation to rule on the merits of any such possible other claims. Sherman Act claims are within the exclusive jurisdiction of the federal courts; they simply cannot be brought in the courts of Illinois.

The plurality also raises the possibility that the plaintiffs, unable to bring their federal claim in state court, should have brought a *state* antitrust claim. The plurality argues that the alleged near identity of such a state antitrust claim with a Sherman Act claim should bring into play the application of res judicata to the present federal claim. Never in recent times—with only one exception—has a federal court held a federal antitrust claim barred by the availability or actual prosecution of a state antitrust action.[12]

The plurality rejects the myriad precedents against a state action as a bar ostensibly because most of these decisions predate the Fourth Circuit's departure from this rule in *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981). In the one decision subsequent to *Nash*, the Ninth Circuit declined to follow the Fourth Circuit decision since it was easily distinguishable. *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 n.1 (9th Cir.), *cert. denied*, 456 U.S. 1011 (1982). However, the RESTATEMENT (SECOND) OF JUDGMENTS is explicit on the very problem presented in *Nash* and in the case before us.

> A Co. brings an action against B Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred.

RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1)(c) comment c, illustration 2 (1982).[13]

In *Nash*, the single modern exception to the rule that a state action cannot bar a Sherman Act claim, the plaintiff school board attempted to bring a federal antitrust claim. This claim was held to be barred by res judicata because of an earlier state antitrust claim prosecuted by the state attorney general—a privy of the plaintiff. Very importantly for the equities of the matter, the earlier case had been settled with a consent decree accepted by all parties to the litigation. In holding that the federal suit was barred, the court also noted that the North Carolina antitrust statute was *identical* to the comparable federal statute except for the latter's requirement of involvement in interstate commerce. 640 F.2d at 490.

There are at least four persuasive reasons for refusing to follow *Nash*. First, the *Nash* court used language apparently recognizing that the court hearing the first claim

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[12] At least five circuits including this one have expressly adopted the rule that the availability of a state claim does not bar a federal suit based on a federal statute over which the federal courts have exclusive jurisdiction. *See Hayes v. Solomon*, 597 F.2d 958, 984 (5th Cir. 1979); *Kurek v. Pleasure Driveway & Park District of Peoria*, 583 F.2d 378, 397 (7th Cir. 1978); *Clark v. Watchie*, 513 F.2d 994, 997 (9th Cir.), *cert. denied*, 423 U.S. 841 (1975); *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759, 762 (2d Cir. 1968); *Cream Top Creamery v. Dean Milk Company, Inc.*, 383 F.2d 358, 362-63 (6th Cir. 1967).

[13] The Restatement is therefore squarely against the innovations of the plurality and of Judge Flaum in concurrence.

must have had jurisdiction to hear the second claim before res judicata could be applied. Nonetheless, in holding that the state antitrust claim barred the federal claim, the *Nash* court in effect eliminated this jurisdictional competency requirement from the res judicata formulation which the Supreme Court had once again made explicit in its 1981 decision, *Federated Department Stores*, *supra*. The *Nash* court thus misconstrued the Supreme Court's res judicata formulation in *Montana* and *Federated Department Stores* and went on to base its analysis on the incorrect thesis that an exclusively federal action and a state court action could ever be the same "cause of action" and that the latter could thereby bar the former.

Second, the special and strong equities of *Nash* induced the Fourth Circuit to overlook overwhelming federal and other authority, as well as crucial and long-honored policies. *Nash* is a hard case that has made bad law. The plurality here fails to note that the first lawsuit in *Nash* had been terminated by a settlement and a consent decree involving the very antitrust allegations that formed the basis of the federal suit. This presented the strongest possible equitable case for claim preclusion against a subsequent federal treble damages antitrust action brought by a party in privity.[14] The termination of the first lawsuit by a settlement and consent decree is the true rationale underlying the *Nash* decision, and *Nash* is, therefore, not in fact in conflict with the holding which I think appropriate here. In the case before us, Drs. Treister and Marrese never obtained a consent decree in their state common law actions. In fact, these plaintiffs never got their case beyond the pleading stage. Instead, the state court merely found (over Justice Simon's persuasive

[14] "[S]ettlement of state court litigation has been held to defeat a subsequent federal action if the settlement was intended to apply to claims in exclusive federal jurisdiction as well as other claims." 18 C. Wright, A. Miller, E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4470, at 608 (1981). *Accord Abramson v. Pennwood Investment Corp.*, 392 F.2d 759, 762 (2d Cir. 1968).

dissent) that the doctors had failed to allege an essential element, economic necessity, of their common law claim.

Third, there is in the case before us a lack of identity between the Illinois antitrust statute and the Sherman Act. The plurality here concedes that in *Nash* the state statute was a "mirror image" of the federal. *Supra*, at 6. For one thing, the liability provisions of the Illinois statute (unlike that of North Carolina) are on their face different from the Sherman Act provisions. In addition, the federal statute grants treble damages to a successful plaintiff as a matter of right. The statute in *Nash* did the same. The Illinois statute, however, permits damages in a "rule of reason" case up to a treble amount only at the discretion of the trial court and when the violation was willful. ILL. REV. STAT. ch. 38, ¶ 60-702) (1981). Although not considered a significant distinction by the plurality,[15] the availability and structure of monetary damages may make every difference in the world in a plaintiff's decision to pursue a particular remedy. The *Nash* court itself relied on this factor to distinguish its decision from the long line of cases which hold that a federal antitrust claim is not barred by the availability of a state antitrust claim.

> In this suit, however, under the state statute, modeled as it is after the federal statute and offering the same right to recover treble damages as the federal statute, there is not the ground for denying *res judicata* effect to the state court judgment stated in

[15] The plurality writes, *supra*, at 11, that "it is doubtful that [the plaintiffs] had any objective in bringing this suit other than to get themselves admitted to membership" and that therefore, presumably, they did not really expect to receive any monetary damages. Yet the plaintiffs did seek mandatory treble damages in their federal antitrust claim, and this relief is one which in the state courts is purely discretionary. The plurality's speculation as to why the plaintiffs chose to pursue the litigation strategy they did is beside the point, especially when we have the uncontroverted fact of their request for treble damages before us now.

[*Hayes v. Solomon, supra*] and [*Cream Top Creamery v. Dean Milk Co., supra*, n.12].

640 F.2d at 490.[18]

There is a delicate balance in res judicata doctrine between the undesirability of relitigating the same claim and the desirability of having a chance to litigate a particular claim at least once. To ignore *Nash*'s reliance upon absolute identity of claims and to move on to mere similarity of claims is to lose all coherence and predictability in the law of res judicata, as well as to visit manifest injustice upon litigants.

Fourth, the Fourth Circuit in *Nash* did not even suggest that a prior state court action, as different from the subsequent exclusively federal action as were the prior state court actions here, could constitute the same "cause of action." I should think a minimal concern for fairness here ought to prevent us from following the *Nash* approach. As the district court has said with respect to the present case:

> *Nash* considers that a plaintiff who "choos[es] to file the state action on the same cause of action [has] voluntarily waived the benefit, if any, of a federal forum" (640 F.2d at 492)—and that simply does not apply here.

Marrese v. American Academy of Orthopaedic Surgeons, 524 F. Supp. 389, 394 (N.D. Ill. 1981).

Although the plurality displays an impressive conceptual virtuosity in pursuing a sort of free-floating theory

[18] *See also Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818 n.1 (9th Cir. 1982) (the Ninth Circuit, in distinguishing *Nash*, stated that *Nash* does not apply when the antitrust statutes of two jurisdictions are not the same); *Hayes v. Solomon*, 597 F.2d at 964 (prior litigation in state court for breach of a lease does not bar subsequent federal antitrust suit primarily because the state court "could not provide the relief sought in the second forum, federal antitrust damages").

of res judicata, it goes well beyond any precedent or well-accepted explanation. The plurality rationalizes its position by invoking certain policy goals which it purports to further, yet it both overlooks other policies, which are at least as important, and subverts the very policies which it professes to advance.

The first and perhaps most crucial policy at issue here is the one underlying the Sherman Antitrust Act. 15 U.S.C. §§ 1 *et seq.* The Sherman Act is our nation's "comprehensive charter of economic liberty" and embodies, together with its judicial interpretations, the fundamental rules of competitive conduct in our national market economy. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

> It is not difficult to see . . . that a congressional intent that the Sherman Act reach as far as the Constitution permits would embrace virtually any economic act in our infinitely interconnected national economy . . . . Ours is a unitary national economy. With a few exceptions for contrary state and federal law, . . . the Sherman Act commands a competitive regime for which state borders are irrelevant . . . . [T]he economy is a seamless web in which everything affects everything. What may appear to be relatively local will, in fact, ultimately affect similar or related goods or services moving into or out of a market.

1 P. Areeda and D. Turner, ANTITRUST LAW 229 (1978). If the national economy is a "seamless web," the possible bias of state courts toward local industries and toward local trade customs makes it undesirable that they administer the Sherman Act. In addition, a uniform interpretation of the antitrust laws in the context of uniform rules of federal practice and of discovery is necessary to a consistent and predictable application of national policy toward competition.

> Federal judges are relied upon to achieve uniform and expert interpretation of the law in a way that cannot be achieved by Supreme Court review of state

> decisions. Federal procedure is relied upon to achieve accurate resolution of disputed factual matters, with particular emphasis on the availability of jury trial and searching discovery.

18 C. Wright, A. Miller, E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4470, at 676 (1981) (citations omitted).

The plurality suggests that the reason for exclusive federal jurisdiction must be "a judgment that only federal judges can decide antitrust cases intelligently . . . ." But the plurality's protestations of respect for the mental prowess of state judges are beside the point and prove too much. If the intelligence of state judges were the only limitation on the abdication of federal jurisdiction, *all* federal claims could be tried in state court and the federal courts could go out of business.

Allowing the different state courts to adjudicate federal antitrust issues would tend to result in 50 different interpretations of the antitrust statutes.[17] Such a state of affairs is inconsistent with the goal of a national regime of competition. Without uniform enforcement in the federal courts, a corporation selling in a national market could, for example, find its prices deemed predatory in one state and not in another. The gain which the plurality may perceive in judicial economy (which is entirely speculative) could be lost many times over through a loss of uniformity and certainty in the application of the antitrust laws, as well as through a need to relitigate the legitimacy of the same practice several times in different state courts.

[17] One need only consult the state annotations to the Uniform Commercial Code, which, with slight variations, has been enacted in identical form in virtually every state. There are, of course, different interpretations in the different states. This situation may be acceptable and perhaps desirable in the context of commercial litigation under state law and is the best that can be hoped for where there is no controlling federal statute. Here, of course, there is a strongly controlling federal statute and policy.

Second, an important policy goal which the plurality ascribes to *Federal Department Stores* and *Noah*—the lightening and efficient handling of the judicial caseload—is not furthered by the plurality decision here. In fact, the plurality decision may produce a result directly opposite to its professed intentions. Under the views of res judicata espoused both by the plurality and by Judge Flaum, plaintiffs with both state and federal claims will be compelled to file claims in both courts at the same time; furthermore, the cautious plaintiff will be inclined to file all state claims as pendent to a federal claim—the strategy which the plurality recommends. Not only will this require federal district courts to adjudicate many state claims and thus further burden the federal system, but it will specifically require federal judges to decide numerous questions of state law.[18] This result is surely not consistent with the plurality's presumed concern for deference to state courts. In sum, this approach will backfire by moving litigation into federal court, by strengthening the federal role in state matters and by doing nothing to diminish the overall volume of litigation.

Again, as we have noted, this is distinctly not a question of relative intelligence of state and federal judges, but it may be a question of relative expertise. Just as federal judges may have greater experience in the adjudication of federal antitrust claims, so state judges develop more extensive experience in the law of their own state. From this standpoint, there would be no practical advantage in trying Sherman Act claims in state court or state common law claims in federal court. Further, plaintiffs should have the right to choose their forum, particularly when issues of relative expertise are at stake, without their choice being arbitrarily dictated under a rigid doc-

[18] An alternative, of course, is that federal courts might decline, in their discretion, to hear the state claim under *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). This would certainly not economize judicial resources.

trine of federal abstention. As Justice Stewart wrote in his dissent to the first panel opinion:

> [t]his expansion of the doctrine of res judicata contradicts the principle, fundamental to our legal system, that parties, not judges, choose the forum in which to resolve their differences and frame the claims advanced in their pleadings.

892 F.2d at 1100.

The plurality approach ignores the possibility that the plaintiff has identified one claim which he believes to be easier to prove than the others. Here the plaintiffs brought a common law claim in state court, which certainly seems plausible to me but which bears no relation to the antitrust laws. Plaintiffs pursued this course in the expectation, I presume, that they would have an opportunity to bring the federal antitrust claim at some other time, if that proved necessary. I do not see how requiring them to bring the federal claim at the outset—or risk losing it—conserves the resources of the federal court.

Third, I think we should consider seriously the ramifications of the kind of free-wheeling res judicata analysis employed by the plurality. In considering whether the liability and damages standards are the same under the Illinois antitrust statutes as under the federal antitrust statutes, the plurality says:

> The question should be answered not in gross but with reference to the specific provisions of the state and federal statutes, read in light of the specific allegations of the complaint. If, applied to the particular case, the state and federal standards are the same, it does not matter that applied to some other case they might be different.

Supra, at 9.

The plurality then conducts a quite speculative analysis of the plaintiffs' claims under the state statute and their claims under the federal statute. The plurality tracks possible outcomes with respect to liability under both, as well

as the respective remedies available under the state and federal statutory schemes. At last, the plurality concludes that the standards of liability would have been the same in a state suit as in a federal suit and that plaintiffs were probably not much interested in the more generous damages provisions of the federal scheme. *Supra*, at n.15.

This sort of speculation (or second-guessing) about the plaintiffs and their thoughts and intentions is so conjectural as to resemble more a flight of fancy than an exploration of fact. It would be manifestly impractical for us to guess in every case, for example, whether or not the plaintiffs "really" needed or "really" sought damages as a basis for determining whether their state action should preclude their federal action. This is surely not the path to certainty in the law, and lack of certainty is a major contributor to unnecessary lawsuits. Nor should we retroactively dictate a party's litigation strategy by determining when and in what court he should have brought his claims.

Fourth and finally, there is a basic problem of fairness in the approach advocated by the plurality. The plurality may have concluded in advance of trial (and even of discovery) that the defendant is a wholly innocent vehicle of professional enlightenment, while the plaintiffs are vengeful malcontents seeking to harass their betters. On this basis, the plurality thinks it appropriate to construct a new law of res judicata to employ the plaintiffs' abortive invocation of state law as a barrier to entry into the federal courts. Dr. Treister has alleged that he was blackballed because he had testified for plaintiffs in medical malpractice suits. If true, this is a claim that federal courts should presumably hear; *see Williams v. St. Joseph Hospital*, 629 F.2d 448 (7th Cir. 1980) (allegation that doctors conspired to refuse to treat patients who instigated malpractice suits stated a cause of action under the federal antitrust statutes). We, of course, will never know whether Dr. Treister's allegation is even partly substantiated. Discovery has been blocked in both state court and federal

court, and, if Dr. Treister or Dr. Marrese has any just claims, they will be heard by no one.

The plurality is concerned about the possible hardship to those who vetoed the plaintiffs' membership applications (or their informants) if the plaintiffs should identify them and subsequently take their depositions. Nothing is said about the hardship to Drs. Marrese and Treister of being excluded without stated reason from this powerful association of orthopaedic surgeons, which bears a coveted seal of approval. Harassment by discovery is to be deplored but not more so than arbitrary and unjust denial of access to the federal courts.

I therefore respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2671

R. ANTHONY MARRESE, M.D. and
MICHAEL R. TREISTER, M.D.,

Plaintiffs-Appellees,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 80 C 1406—Milton I. Shadur, *Judge.*

ARGUED FEBRUARY 26, 1982—DECIDED NOVEMBER 4, 1982

Before PELL, *Circuit Judge*, STEWART, *Justice (Retired)*, and POSNER, *Circuit Judge.**

POSNER, *Circuit Judge.* This appeal from a judgment of criminal contempt brings up to us issues of res judicata, pretrial discovery under Rules 26(c) and (d) of the Federal Rules of Civil Procedure, and the application of the Sherman Act's "Rule of Reason" to denial of membership in a professional association.

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* Judge Sprecher was originally the third member of the panel, but his untimely death prevented his participation in the decision of this case. Judge Posner took his place and has read the briefs and pertinent portions of the record and has listened to the tape recording of the oral argument.

The defendant-appellant in this case is the American Academy of Orthopaedic Surgeons, a private association to which most orthopaedic surgeons in the United States belong. The plaintiffs are two orthopaedic surgeons who practice in Evansville, Indiana, and Chicago, respectively, and were denied membership in the Academy without a hearing or a statement of reasons. Membership is alleged to confer certain professional advantages, but it is not a prerequisite either to being certified to practice as an orthopaedic surgeon or to obtaining hospital staff privileges. Each of the plaintiffs is certified to practice orthopaedic surgery and has staff privileges at several hospitals.

After being refused membership the plaintiffs brought suit against the Academy in an Illinois state court. They claimed a right under Illinois law to a hearing on their application and to reasonable standards for membership. The Illinois Appellate Court held that the complaint failed to state a claim because membership in the Academy is not an "economic necessity." *Treister v. American Academy of Orthopaedic Surgeons*, 78 Ill. App. 3d 746, 755-56, 396 N.E.2d 1225, 1232 (1979). Having lost in state court the plaintiffs then sued the Academy in federal district court for injunctive relief and damages under section 1 of the Sherman Act, 15 U.S.C. § 1, charging an illegal boycott. The complaint alleged that the Academy is "a monopoly in its field, possessed of substantial power to control the market for orthopaedic surgical services," and that the plaintiffs, though fully qualified for membership under the announced criteria of the Academy, were excluded for "extraneous" reasons, which in the case of Dr. Treister (no particulars were given for Dr. Marrese) included "(a) his supposed willingness to offer expert testimony against other orthopaedic surgeons in medical malpractice cases; (b) his known willingness to consult surgical out-patients on a relatively high-volume basis; and (c) his nonconformity of personality and personal attitudes with those of most established orthopaedic surgeons and in particular those who were already members of the academy." The complaint alleged that the Academy had refused to explain its actions and that the effect of those

actions was "to limit competition and enforce conformity with current business practices" and to injure the plaintiffs in the practice of their profession.

The Academy moved to dismiss the complaint on two grounds: the judgment dismissing the plaintiffs' state court action was res judicata in the federal proceeding; the complaint failed to state a claim under the Sherman Act. The motion was denied, 496 F. Supp. 236 (N.D. Ill. 1980), and discovery began. The plaintiffs asked the Academy to produce all of its correspondence and other documents relating both to the denial of the plaintiffs' application for membership and to all other denials of membership applications between 1970 and 1980. The Academy refused. It persisted in its refusal even after the district court issued a protective order limiting access to the discovered materials to the plaintiffs and their counsel, and even after the court ordered the Academy to produce the requested documents. The court held the Academy in criminal contempt of its order and fined it $10,000. The Academy appeals from that judgment.

The Academy asks us to hold that the discovery order was an abuse of the district court's discretion under Rule 26(c) of the Federal Rules of Civil Procedure. The plaintiffs point out that it is not a final order and argue that we cannot review it because the district court has not certified it for an immediate appeal under 28 U.S.C. § 1292(b). But the contempt judgment is a final order, reviewable by us; and a party who is willing to pay the price of being punished for contempt (or suffering an equivalent sanction such as dismissal of the complaint) if the validity of the order he has disobeyed is ultimately upheld may by that means get immediate review of the order. Many cases hold this. See, e.g., *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Ryan v. Commissioner of Internal Revenue*, 517 F.2d 13, 19-20 (7th Cir. 1975); *Hanley v. McHugh Constr. Co.*, 419 F.2d 965, 967 (7th Cir. 1969); *National Util. Serv., Inc. v. Northwestern Steel & Wire Serv., Inc.*, 426 F.2d 222 (7th Cir. 1970); *Hastings v. North East Independent School Dist.*, 615 F.2d 628, 631 (5th Cir. 1980). But these cases

coexist uneasily with another line of cases which holds that where as in this case the judgment is for criminal rather than civil contempt, the validity of the underlying order may not be questioned on appeal from the contempt judgment. See, e.g., *United States* v. *United Mine Workers of America*, 330 U.S. 258, 291-94 (1947); *ITT Community Development Corp.* v. *Barton*, 569 F.2d 1351, 1356 (5th Cir. 1978). Yet our decision in *Hanley*, for example, involved criminal contempt.

The two lines of cases can be reconciled, see *Hanley*, *supra*, 419 F.2d at 967; *United States* v. *Ryan*, *supra*, 402 U.S. at 532 n.4; 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3537, at pp. 340-41 (1975), by noting that in cases where the validity of the underlying order has been held not to be reviewable on appeal from the judgment of contempt, the order could have been appealed directly, while discovery orders cannot be, other than through discretionary or extraordinary procedures, such as section 1292(b) appeals and mandamus proceedings. The right to have a discovery order reviewed on appeal from a contempt judgment for disobeying it is thus one of the safety valves in the final-judgment rule, 28 U.S.C. § 1291. A discovery order may impose heavy and irrecoverable costs on a party; yet to make discovery orders appealable as of right would lead to intolerable delays in federal litigation. Confining the right to appellate review of discovery orders to cases where the party against whom the order was directed cared enough to incur a sanction for contempt is a crude but serviceable method of identifying really burdensome discovery orders, and waiving the finality rule only for them. The validity of the discovery order that the Academy disobeyed is therefore properly before us.

Rule 26(c) of the Federal Rules of Civil Procedure empowers the district court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that discovery not be had . . . ." The effective management of complex litigation requires that the district judge be allowed a broad discretion in guiding the discovery process, and therefore in exercising his powers under Rule 26(c). *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981). But his discretion is not unlimited and if he abuses it he commits reversible error. *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977).

In ruling on a motion under Rule 26(c) to limit discovery, the district court must compare the hardship to the party against whom discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery if discovery is denied. Not only the magnitude of the hardship, but its nature, must be considered. Purely private interests should be given less weight than interests that are considered to have a special social value.

The Academy argues that the First Amendment immunizes from discovery its correspondence and other documents relating to denials of applications for membership. This is a way of saying that the interests it is asserting have a more than purely private value. But the Academy goes too far, as this court's recent decision in *Memorial Hospital for McHenry Cty.* v. *Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) (per curiam), which rejected a claim of privilege for a hospital's records of disciplinary proceedings against staff physicians, makes clear. Even if the Academy were engaged in advocating controversial views, and the publication of its internal files would expose members to retaliation for those views, it would not have an absolute privilege against discovery, though the plaintiffs would then have a heavy burden of showing that the information sought was vital to their case and unobtainable by means less likely to discourage such advocacy. *See Hastings* v. *North East Independent School Dist.*, *supra*, 615 F.2d at 632; *In re Petroleum Prods. Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982).

Yet we cannot say that there is not lurking in this case if not a First Amendment right at least a First Amendment interest, which the discovery sought by the plaintiffs would impair and which differentiates this case from the usual antitrust case where discovery is sought of invoices or salesmen's reports or the minutes of a corporation's board of directors. The Academy may be

engaged in a conspiracy to violate the antitrust laws, but it is also engaged in an exchange of information about surgical techniques and related matters of great public interest. This exchange may be inhibited if the Academy has to disclose its membership files, even under a protective order; a protective order is the kind of lawyers' arrangement that laymen instinctively distrust. If the Academy complies with the discovery order its members may be reluctant to offer candid evaluations of applicants in the future, and the atmosphere of mutual confidence that encourages a free exchange of ideas may be eroded.

It is also necessary to consider the probable impact of the discovery order, if it is upheld, on the purely private interests of the Academy and its members. One does not have to raise the ghosts of Aristotle and de Tocqueville to be reminded that voluntary associations are important to many people, Americans in particular, and that voluntary professional associations are important to American professionals (the last proposition is the very premise of the plaintiffs' antitrust suit, as it was of their Illinois suit). Confidentiality in deliberations on membership is essential to the voluntary character of an association. Without it there are no candid evaluations of applicants, and without such evaluations the character of the association as a group of people associating by free choice is compromised. Apart, therefore, from any First Amendment considerations, which we have said are only indirectly implicated by the discovery order, the involuntary disclosure of the membership files of a voluntary association is inimical to the private (but worthy) objectives of the association, even when a protective order is issued. This is not to say that such disclosure may not be ordered; but it involves a significant hardship, which must in every case be balanced against its benefits.

On the benefit side of the ledger in a Rule 26(c) analysis the emphasis usually is on whether there are other, less burdensome means of getting the information that the party seeking discovery needs to prove his case. But another consideration, less frequently emphasized but no less legitimate, is whether his case has any possible

merit. If it does not, the only "value" of the requested discovery will be to give the party seeking it leverage to extort a settlement, by enabling him to impose on his opponent costs that may induce a settlement offer despite the lack of merit of the case. Predatory discovery is a serious problem in federal litigation today, and Rule 26(c) is one of the district court's too little used weapons against it. This is not to say that a Rule 26(c) movant may demand a trial of the merits on the spot. But suppose that after the pleadings, and the evidence obtained from all the other discovery in the case, are interpreted in the most favorable light to the party seeking the discovery order, and after every assumption favorable to that party with respect to what the requested order might turn up by way of additional evidence is indulged, it seems highly unlikely that the party's claim or defense, as the case may be, has any possible merit. A motion for summary judgment might be premature because discovery was not yet complete. But if the discovery requested would be burdensome, the probable lack of merit of the underlying claim or defense is not irrelevant to the district court's exercise of its discretion under Rule 26(c).

This point is not new. "The court has discretion whether or not to order discovery, however, and it would hardly be an abuse of discretion to refuse discovery when the claim or defense appears baseless and discovery would work a hardship on the other party." 4 Moore's Federal Practice ¶26.56[1], at pp. 26-124 to 26-125, n.20 (Moore & Lucas eds. 1982). See *Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 147 (2d Cir. 1981); *Spier v. Home Ins. Co.*, 404 F.2d 896, 899-900 (7th Cir. 1968); *Dionne v. Springfield School Comm.*, 340 F. Supp. 334, 335 (D. Mass. 1972) (Wyzanski, J.) ("Federal courts do not stage academic tournaments merely for Don Quixotes to practice knighthood"). In a clear case, refusal to deny a discovery request on this ground (burdensome request in support of a probably baseless claim) could be an abuse of discretion; we must decide whether this is such a case.

The Academy has advanced several grounds for believing that this antitrust suit has no conceivable merit,

whatever the correspondence and membership files that the plaintiffs are trying to obtain may show about its motives in refusing to admit the plaintiffs and other applicants to membership. One is that the suit is barred by res judicata because of the earlier judgment against the plaintiffs in their state court action against the Academy. True, the plaintiffs did not include an antitrust count in that action. But res judicata bars not only the claims that a party actually made in the first suit but also the claims he could have made on the basis of the facts that he alleged in that suit. A plaintiff may not split his cause of action by bringing a suit on one theory and then, after he has lost, trying again on a different theory. *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981); *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981). "Cause of action" in this context is simply the set of facts that establishes a right to relief under any theory that the plaintiff could have asserted in his first suit. Here that set of facts comprises the circumstances and consequences of the Academy's refusal to admit Drs. Marrese and Treister to membership, and it is irrelevant that the plaintiffs chose not to allege the antitrust implications of those facts in their state court action.

But the plaintiffs point out that they could not have joined their Sherman Act claim to the other claims that they were prosecuting in state court. *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.*, 252 U.S. 436, 440-41 (1920), held that the federal courts have exclusive jurisdiction over suits alleging violations of the federal antitrust laws, and the holding is repeated in many modern cases, such as *Kurek v. Pleasure Driveway & Park Dist. of Peoria, Ill.*, 583 F.2d 376, 379 (7th Cir. 1978) (per curiam), in this circuit. This proposition has been questioned. See Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 Harv. L. Rev. 509, 510 n. 13 (1957). It has no basis in the language or legislative history of the federal antitrust laws; and the fact that, as we are about to see, state courts adjudicate defenses based on federal antitrust law, with preclusive effect under the doctrine of collateral estoppel in any subsequent federal antitrust suit, shows that state courts are competent tribunals to adjudicate federal antitrust questions—and why should this not be so in cases brought, as well as defended, under federal antitrust law?

But however this question is answered, it cannot be doubted that the plaintiffs could have joined a claim under the Illinois Antitrust Act, Ill. Rev. Stat. 1981, ch. 38, § 60, in their state court suit; and we must consider how close a substitute it would have been for their Sherman Act claim. The language of the Illinois act is not identical to that of the Sherman Act. Section 1 of the Sherman Act forbids conspiracies and other agreements to restrain trade. Section 3(2) of the Illinois Antitrust Act, which, with an exception noted later in this opinion, is the section under which a boycott would be challenged, see *Bar Committee Comments—1967*, Smith-Hurd's Ill. Ann. Stat. ch. 38, at p. 452 (1977), forbids conspiracies and other agreements to restrain trade "unreasonably." Ill. Rev. Stat. 1981, ch. 38, § 60-3(2). The difference in language has persuaded the Illinois Appellate Court that a boycott challenged under section 3(2) could never be pronounced illegal per se; it would have to be evaluated under the Rule of Reason. *Blake v. H.F. Group Multiple Listing Serv.*, 36 Ill. App. 3d 730, 743, 345 N.E. 2d 18, 28 (1976). But that is of no moment in the present case. We shall see that the only tenable theory of an illegal boycott that these plaintiffs have is a Rule of Reason theory, not a per se theory; and so far as boycotts that are unlawful only if unreasonable are concerned, we can find no difference in substantive standards between the Illinois and federal acts. See *Blake*, *supra*, 36 Ill. App. 3d at 739, 743, 345 N.E.2d at 25, 28; *cf. People v. Crawford Distrib. Co.*, 53 Ill. 2d 332, 339, 291 N.E.2d 648, 652 (1972), interpreting Ill. Rev. Stat. 1981, ch. 38, § 60-11.

But there is a difference in the remedies under the two acts. A prevailing plaintiff in a boycott case under the Sherman Act as in any other federal antitrust case is entitled to an automatic trebling of his damages. See 15 U.S.C. § 15. But section 3(2) of the Illinois act is subject to

the following provision: "if it is shown that [the] violation was willful, the court may, in its discretion, increase the amount recovered as damages up to a total of 3 times the amount of actual damages." Ill. Rev. Stat. 1981, ch. 38, § 60-7(2).

If it were not for this difference *Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 487-93 (4th Cir. 1981), would be a direct precedent for holding that the plaintiffs' federal antitrust claim is barred by res judicata. The Fourth Circuit thought it intolerable that a plaintiff should be able to bring an antitrust suit in state court under a state statute identical to the Sherman Act and then, after final judgment in that suit, bring the same suit in federal court under the Sherman Act. And, as we have said, it would have made no difference in *Nash* if the first suit had been brought under another theory and the plaintiff had reserved his antitrust theory for later use in federal court in the event that he failed to win in state court on the other theory.

Nash is a frankly innovative decision; it rejects contrary authority in three circuits. *See Abramson v. Pennwood Inv. Corp.*, 392 F.2d 759, 762 (3d Cir. 1968); *Clark v. Wolnkie*, 513 F.2d 994, 997 (9th Cir. 1975); *Hayes v. Solomon*, 597 F.2d 958, 984 (5th Cir. 1979). (Our circuit has never spoken to the question, although the brief per curiam opinion in *Kurek v. Pleasure Driveway & Park Dist. of Peoria, Ill.*, *supra*, could be read to imply, though it does not expressly adopt, an approach inconsistent with *Nash*.) But these cases predate *Nash*, and the courts that decided them may want to reexamine their position in the light of the full and convincing discussion of the issue in *Nash*; the academic authorities that the court marshaled in support of its position, *e.g.*, Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 347-48 (1978); the enigmatic but seemingly dispositive Supreme Court precedent on which the court relied, *Becker v. Contours Labs., Inc.*, 279 U.S. 388, 391-92 (1929) (per Holmes, J.); and the preclusive effect of state court factfindings in subsequent federal antitrust suits.

The last point will bear some elaboration. The best reason for not giving preclusive effect to a judgment in an earlier state court action would be a belief that state courts were not competent to adjudicate federal antitrust questions, even if the state had enacted a statute, enforceable of course in its own courts, tracking the federal antitrust statutes. But this belief cannot be maintained given that state courts are allowed to decide federal antitrust questions, with preclusive effect under the doctrine of collateral estoppel, in suits in which a federal antitrust claim is raised by way of defense. At least this is clear where the question is factual. *See Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 188 (2d Cir. 1955); *Calvert Fire Ins. Co. v. American Mutual Reinsurance Co.*, 600 F.2d 1228, 1236 n. 18 (7th Cir. 1979) (dictum). But the essential issues in most federal antitrust cases—relevant market, market power, effect on competition, monopolistic intent, and so forth—are factual. If state courts are competent to decide those issues with preclusive effect in any subsequent federal suit, and the state's antitrust law is identical to the federal law, we do not see how an antitrust claimant can object to being required, in the interest of judicial economy, to litigate his antitrust claim in state court under state law when he is already in state court, by his choice, on another claim. That is the essential insight of *Nash*.

But *Nash* does not speak directly to a case such as this where the state antitrust statute is not identical to the federal. The question what to do in such a case was reserved in *Nash*, 640 F.2d at 490, 492. The plaintiffs like the answer given in *Lyons*, *supra*, which held that a state court judgment would not bar a federal antitrust suit, in part because treble damages could not have been obtained in the state suit. *See* 222 F.2d at 189. That case is distinguishable from this one, though. For one thing, Lyons had no chance of getting treble damages in state court, whereas Marrese and Twister would have had some chance of getting treble damages under the Illinois Antitrust Act if they had sued under that act. But they would have had two hurdles to jump that would not face them in a federal antitrust suit. They would have had to

prove a "willful" violation and would have had to appeal to the trial court's discretion to award treble damages. The approach of the Illinois act is, much as in the typical criminal statute, to set a maximum penalty which the "sentencing" court presumably will impose only in extreme cases, rather than a definite penalty as under federal antitrust law.

But there is another and better distinction between this case and *Lyons*. Since Westinghouse had sued Lyons in state court for breach of contract and Lyons had interposed the defense that the contract was illegal under the Sherman Act, the question was whether a judgment in the state suit on the merits of this defense would bar Lyons from maintaining a Sherman Act suit against Westinghouse in federal court. The court held that it would not, in part as we have said because Lyons could not have obtained treble damages (or for that matter any damages) from successfully asserting his defense of antitrust illegality to Westinghouse's state law contract claim. If res judicata had applied, Westinghouse would by suing in state court have succeeded in putting Lyons to the choice of either giving up his claim to treble damages or abandoning a possibly meritorious defense in the state suit. Cf. *New York State Teamsters Conf. Pension & Retirement Fund v. Pension Benefit Guar. Corp.*, 591 F.2d 963, 967 (D.C. Cir. 1979). The plaintiffs in the present case did not face this painful choice. If they wanted a state forum they could have joined a state antitrust count to their other state law counts and they would then have had a shot at treble damages, though not so sure a one as if they had brought a federal suit. Alternatively, they could have sued in federal court first, alleging a violation of the Sherman Act and joining to their federal claim the state law claims which they instead decided to sue on in state court. The federal court would have had jurisdiction to decide the state law claims under the doctrine of pendent jurisdiction.

Neither choice was as attractive to the plaintiffs as the one they made, which was to try the case piecemeal, litigating their state law claims in state court and their federal law claim in federal court with an adverse outcome in the first litigation having (they hoped) no preclusive effect on the second. No reason for this procedure has been suggested. And against its advantages to the plaintiffs must be balanced the inconvenience to the defendant, and to the state and federal judicial systems, of allowing a plaintiff to try his case in stages with the decision at one stage having no preclusive effect in subsequent stages (except that actual factfindings made at one stage would, as noted earlier, have collateral-estoppel effect at a subsequent stage). We think the balance favors preclusion where, as in this case, the relevant standard of liability is the same under state and federal law and the remedies are similar though not identical. The plaintiffs' alternatives to piecemeal litigation were not so paltry that the courts should have to entertain such litigation at a time when both the state and federal judicial systems are staggering under caseloads of unprecedented magnitude.

We add that even if the district judge was correct in rejecting the Academy's res judicata argument, he should have considered the piecemeal character of this litigation as part of his appraisal of the hardship to the Academy of complying with the plaintiffs' discovery request. Because the plaintiffs put the Academy to unnecessary legal expense by splitting their claim as they did, their request for a form of discovery that would place a special burden on their opponent should have made a weaker appeal to the district judge's equitable discretion under Rule 26(c) than if the plaintiffs had been litigating their claims against the Academy in a more parsimonious manner.

There is an additional reason for believing that the plaintiffs' antitrust suit may be groundless whatever the contested discovery might reveal. This reason has as we shall see different implications for the district court's exercise of its Rule 26(c) powers: not that it should have denied the requested discovery altogether but that it should have postponed discovery of the membership files pending other, less burdensome discovery that might quickly have shown whether the suit was indeed groundless as a matter of antitrust law.

The great watershed of that law is the distinction between per se illegality and illegality under the Rule of Reason. If a practice is within the per se category, all you have to prove to establish a violation is that the defendant engaged in the practice; you do not have to show that in fact the practice has had or will have an adverse effect on competition. But if a practice is not within the per se category—if it is governed, in other words, by the Rule of Reason (the dichotomy is not perfect, as there are some practices, mergers for example, that are governed by another standard altogether, but this refinement is irrelevant to this case)—then the plaintiff must, to prevail, show not only that the defendant engaged in the practice but also that by doing so the defendant was injuring competition. "[A]ny rule of reason analysis requires a showing of anticompetitive market effect." *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981); see *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1352 (7th Cir. 1982); *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980).

The denial of the plaintiffs' applications for membership in the Academy, a collective refusal by the Academy's members to deal with the plaintiffs on the identical terms on which they deal with each other, was a form of boycott. It used to be said often that boycotts were illegal per se. But that was never entirely true. The best known statement of the Rule of Reason is found in a boycott case, *Board of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918). The case involved the legality of an internal rule of a commodities exchange designed to limit competition from some of its members, and a violation of the rule would have been punishable by expulsion. A more accurate generalization today would be that boycotts are illegal per se only if they are used to enforce agreements that are themselves illegal per se—for example, price-fixing agreements. See *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 787-90 (7th Cir. 1981) (en banc), for the general principle, and *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234-36 (7th Cir. 1982), for the price-fixing exception. At least

that is the rule for organized associations having some lawful purposes; we need not consider whether a conspiracy or other ad hoc "association," if anticompetitive in intent, would be treated under a harsher standard.

It is true that some early cases, such as *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912), hold or imply that a boycott which has the effect of totally excluding a competitor from a market is, for that reason alone, illegal; and this could be viewed as a species of per se illegality. As it is uncontested that the American Academy of Orthopaedic Surgeons has no power to prevent anyone from practicing orthopaedic surgery, these cases are of doubtful relevance here; so we need not consider to what extent, with their emphasis on the welfare of competitors rather than consumers (the excluded railroad in the *Terminal Ass'n* case appears to have been complaining about its exclusion from a cartel!), these cases can survive the consumer-oriented view of antitrust that prevails today. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). Reviewing these cases recently this court held that boycotts cannot be deemed illegal per se on the basis of their impact on competitors (rather than on the consuming public) if there is no "direct effort to influence the supply of, or demand for, a competitor's product." *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, Inc.*, 672 F.2d 1280, 1286 (7th Cir. 1982). None is alleged in this case. Treister and Marrese are competitors of Academy members and membership may be valuable in competing with both member and nonmember orthopaedists, but there is no contention that the Academy is interfering directly with the plaintiffs' access to suppliers or customers, as by trying to get their hospital staff privileges revoked. The alleged effect of denial of membership on the plaintiffs' ability to practice orthopaedic medicine is indirect, just as denying a trial lawyer membership in the American College of Trial Lawyers would have only an indirect effect on his ability to obtain clients. We are speaking of matters of degree of course, but an "indirect" effect, by which we mean one falling far short of com-

plete exclusion from the market, will not support a per se attack on a boycott.

Nor do the plaintiffs allege a price-fixing conspiracy among orthopaedic surgeons, a conspiracy to which the exclusion of the plaintiffs from membership in the Academy might be ancillary. Even if, by taking the concept of "notice" pleading to its furthest extreme, we could tease such an allegation out of the statement in the complaint that one of the reasons for denying Dr. Treister membership in the Academy was his "known willingness to consult surgical out-patients on a relatively high-volume basis"—"high volume" perhaps implying low price—it would not help the plaintiffs. If the boycott is a form of price-fixing, the plaintiffs probably could have gotten treble damages as a matter of right rather than grace in a suit under the Illinois Antitrust Act, which provides a right to treble damages in price-fixing cases. See Ill. Rev. Stat. 1981, ch. 38, §§ 60-3(1), 60-7(2). *Nash*, a decision we consider correctly decided, would then be indistinguishable from this case and we would have no doubt at all that the suit was barred by res judicata.

What is far more likely, however, is that the plaintiffs are alleging a boycott that, if it is illegal, is so only by virtue of the Rule of Reason; and therefore they must show, as an essential element of illegality, some "anticompetitive market effect" from the boycott. *Lektro-Vend Corp. v. Vendo Co.*, *supra*, 660 F.2d at 268. To see whether they have done or are likely to be able to do so, assume that all of the facts alleged by the plaintiffs are true. (This is too generous an assumption, for some of the plaintiffs' allegations were denied in an affidavit that the plaintiffs did not counter with an affidavit of their own.) Then the plaintiffs were denied admission to the Academy because they are fierce competitors; others like them are also denied admission for this reason; and membership in the Academy carries with it such great professional advantages that most aspirants to membership—and all orthopaedic surgeons who are not already members are aspirants—will (if this suit fails) have an incentive to avoid engaging in the kind of competitive behavior that these plaintiffs engaged in and that cost them their chance of becoming members.

But even with all this granted the plaintiffs have not come close to showing the kind of competitive effects required in a Rule of Reason case. According to their own statements, the vast majority of orthopaedic surgeons in the U.S. who have been practicing for at least three years (at oral argument one of the plaintiffs' counsel said 99 percent, though we suspect he was using poetic license) are members of the Academy, and it has 10,000 members in all. The Academy places no restrictions of any sort on its members. So far as it is concerned, they can compete as ferociously as they like. They are free to deal with nonmembers such as Marrese and Treister—to practice in association with them, to refer patients to them, and so forth. The Academy's meetings are open to nonmembers such as Marrese and Treister, though they object, frivolously as it seems to us, to having to wear nonmember badges. The freedom of members to deal with nonmembers confirms our earlier point that this is not a case where the association makes a "direct effort to influence the supply of, or demand for, a competitor's product." *Phil Tolkan Datsun*, *supra*, 672 F.2d at 1286.

In these circumstances it is clear that if all of the members of the Academy were in the same market—if all, that is to say, were competitors of one another—the consumer interest in effective competition could not be seriously harmed by the exclusion of these plaintiffs and others like them from the market (not that such exclusion is in the cards: the plaintiffs concede that the Academy has no power to exclude anyone from the practice of orthopaedic surgery). Ten thousand is a vast number of competitors. Unless they explicitly agreed not to compete, and backed up their agreement with elaborate enforcement machinery to prevent individual members from cheating on the agreement, the consumer would be assured the benefits of buying in a competitive market. While there is a sense in which the exclusion of any competitor reduces competition, it is not the sense of competition that is relevant to antitrust law as currently conceived.

Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663-64 (7th Cir. 1982). The policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors. The consumer is guaranteed competitive conditions, but he is not guaranteed and he has no interest in the preservation of, a fixed number of competitors far greater than the number required to assure his being able to buy in a competitive market. Maybe the older view would survive in a case of naked aggression resulting in the total exclusion of a competitor from the market; but that would be a *per se* case (if anything) and this is not.

The 10,000 members of the Academy do not, however, all compete in the same market. The market for orthopaedic surgery is local. Dr. Marrese competes with other orthopaedists in Evansville, Dr. Treister with other orthopaedists in Chicago. The plaintiffs will have the burden at trial of showing that in these local markets the number of orthopaedic surgeons who belong to the Academy is so few that competition among them—competition that the Academy is not alleged to limit or regulate in any way—is insufficient to assure the consuming public the benefits of competition. Unless they can show this they will be unable to ask the trier of fact to draw an inference that either the exclusion of an individual orthopaedist from each market, or the possible effect of that exclusion on the competitive behavior of other aspirants to membership, could result in a higher price or lower quality of orthopaedic surgery in these communities.

The plaintiffs have made no effort as yet in the discovery proceedings in this case to show a probable anticompetitive effect. We do not say they cannot make the required showing; but at this stage of the case, where the only facts of record bearing on competitive effect are the large number of orthopaedists who belong to the Academy and the fact that the Academy does not regulate their behavior in any way, it does not seem to us very likely that they will be able to do so. In these circumstances, we do not think the district court should

have ordered discovery of the Academy's membership files before there was any discovery on the issue of probable anticompetitive effect. A district court has the power under Rules 26(c) and (d) of the Federal Rules of Civil Procedure, and in a clear case the duty, to defer a burdensome discovery request pending completion of discovery on an issue that is likely to dispose of the entire case and thereby make the request moot. See 8 Wright, Miller & Cooper, Federal Practice and Procedure §§ 2040, 2047 (1970). We are not speaking here as we were earlier of denial, but only of postponement; if the former is sometimes appropriate, the latter is more often so. It should have been apparent to the district court, as it is to us, that the present case is likely to wash out over the issue of effect on competition. There would have been no conceivable hardship to the plaintiffs in requiring them to conduct their discovery on this issue before gaining access to the membership files. The sequence of discovery may well have been intended to coerce the Academy to settle, but in any event the balance of hardships is clear enough to make us conclude, independently of the *res judicata* issue, that the district court, in refusing to defer discovery of the membership files, abused its discretion.

Other issues are raised in the briefs, but on the view that we take of the case only one of them need be discussed. The Academy asks us to decide not only that the discovery order was an abuse of discretion but also that the district court's refusal to dismiss the complaint on the basis of *res judicata* was erroneous. We have jurisdiction to decide whether the discovery order was an abuse of discretion, because it is the disobedience of that order that the district judge punished by holding the Academy in criminal contempt. But we would have jurisdiction to review the district judge's refusal to dismiss the complaint only if he had certified that interlocutory order for an immediate appeal under 28 U.S.C. 1292(b), and he did not do so. He did point out that the Academy could if it wished make its *res judicata* argument in its appeal from the contempt citation, and he was right, because the merit of that argument is, as we have seen, germane to whether the discovery order was an abuse of discretion.

But his statement did not satisfy the requirement of section 1292(b) that the district judge, if "of the opinion that such [nonappealable interlocutory] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, . . . shall so state in writing in such order." Since no such statement was made, we do not have jurisdiction to review the district court's order refusing to dismiss the complaint, *In re Watkins*, 271 F.2d 771 (5th Cir. 1959), and the appeal from that order is dismissed for lack of jurisdiction in this court. The judgment of contempt is reversed. Costs in this court to the appellant.

So Ordered.

Stewart, *Justice (Retired), dissenting.*

In this case our mission is no more than to review a criminal contempt citation for refusing to comply with a discovery order. Nonetheless, the majority opinion wrestles with difficult questions concerning, first, the doctrine of res judicata, and, second, the application of the Sherman Act to a denial of membership in a professional organization. It forges new ground, despite the absence of a factual record in this case and despite the existence of contrary precedent in other Circuits. Because I believe that neither of these questions is properly presented for review by this Court, that the substance of the discussion concerning the doctrine of res judicata is extremely dubious, and that the contempt citation was proper, I respectfully dissent.

In the course of litigating an antitrust suit against the defendant-appellant American Academy of Orthopaedic Surgeons, the plaintiffs-appellees Drs. Marrese and Treister sought discovery of the correspondence and other documents relating to the denial of their application for membership in the organization as well as

to all previous denials of membership since 1970. The Academy refused to produce these documents. The District Court then issued a protective order limiting access to the documents to the plaintiffs and their counsel, and ordered the Academy to produce the requested material. Following the Academy's refusal to comply with his order, the District Judge cited the Academy for contempt and imposed a $10,000 fine. The Academy then brought this appeal.

The majority opinion first addresses the question whether, on appeal from a criminal contempt judgment for failure to comply with a discovery order, the validity of the underlying order may be reviewed. The opinion correctly concludes that the validity of an underlying discovery order may be reviewed on appeal from a criminal contempt judgment. *See United States v. Ryan*, 402 U.S. 530, 532-3 (1971).

In reviewing a discovery order, however, an appellate court is limited by the principle that district judges have broad discretion in conducting pre-trial discovery and in framing protective orders. A trial judge's discovery order may not be invalidated unless the order represents an abuse of discretion. *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977) ("[W]e are most unlikely to fault [the trial court's] judgment unless, in the totality of the circumstances, its [discovery] rulings are seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case."); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Swanner v. United States*, 406 F.2d 716 (5th Cir. 1969). An appellate court may not decide whether "it would, in the first instance, have permitted the discovery prayed for." *Tiedman v. American Pigment Corp.*, 253 F.2d 803 (4th Cir. 1958).

In turn, in deciding whether to order discovery and whether to impose protective restrictions on such discovery, a trial judge must balance the interest of the party resisting discovery against the need of the party seeking discovery for the requested material. In the present case, the District Court in framing its protective

order carefully assessed the interests of both the Academy and the two doctors. In attempting to resist discovery, the Academy had argued that production of the requested documents would infringe upon the First Amendment rights of Academy members. The Academy's interest, however, which the District Court correctly identified, is essentially an interest in preserving the confidentiality of its application process in order to preserve the candor of future evaluations. As the majority opinion concludes, that interest is legitimate, but not protected by the First Amendment.

Matched against the Academy's interest in confidentiality was the plaintiffs' need for the requested material. The District Judge carefully assessed this need, noting: "Without access to the documents Drs. Marrese and Treister are effectively prevented from continuing this litigation. . . . Just disposition of plaintiffs' claims . . . would be rendered impossible should they be denied access to the requested information. Proof of the claimed group boycott would require demonstration of the real reasons for Academy's denial of admission to candidates, information obtainable solely through the materials Academy seeks to protect." *Marrese v. American Academy of Orthopaedic Surgeons*, No. 80 C 1405, slip op. at 6 (E.D. Ill. Mar. 5, 1981). Ruling that the Academy's interest in confidentiality was "not . . . insubstantial," the District Court crafted a protective order imposing restrictive conditions under which, in the words of the District Court, "the confidentiality of Academy's admissions process [was] largely preserved." *Id.* at 5. In a later opinion, the District Court carefully considered the argument made on behalf of the Academy that the plaintiffs should be required to complete their discovery on the question of antitrust injury before obtaining access to the documents at issue. The District Court rejected the argument, finding that the possible prejudice to the Academy did not justify requiring the plaintiffs to undertake piecemeal discovery. App. at 138.

The analysis employed and the protective order formulated in this case were virtually identical to the

analysis and order in a very similar, recent antitrust case decided by the same District Judge. In the previous case, a physician sued a group of physicians for excluding him from a hospital staff, and thereby allegedly destroying his practice. He sought discovery from the hospital of certain documents relating to other physicians who had applied for admission to its medical staff. The hospital resisted, even after the District Court issued a protective order, asserting its need for confidentiality to prevent the chilling of the evaluation process. The hospital sought issuance of a writ of mandamus from this Court to compel the District Court to vacate its discovery order. In a *Per Curiam* opinion denying the petition for mandamus, this Court explicitly declined to recognize hospital disciplinary proceedings as privileged from discovery in antitrust cases:

> "To recognize hospital disciplinary proceedings as privileged, regardless of the purpose for which disclosure is sought, would in effect grant such committees, their members and participants absolute immunity from prosecution for all statements made and actions taken in the context of such proceedings . . . . [We] decline to do so. The public interest in private enforcement of federal antitrust law in this context is simply too strong to permit the exclusion of relevant and possibly crucial evidence by application of the Hospital's privilege."

Memorial Hospital for McHenry County v. Shadur, 664 F.2d 1058, 1063 (7th Cir. 1981) (footnote omitted).

The District Court's restricted discovery order in this case was both consistent with precedent and sensitive to the needs of both parties. The order, therefore, in no way represented an abuse of discretion. Based on this limited inquiry and conclusion, the analysis of the validity of the contempt citation, in my opinion, should end and the District Court's order should be affirmed.

The majority opinion, however, embarks on a lengthier course of analysis. The opinion correctly states that the District Court was required to compare the hardship to

the party against whom discovery is sought, if discovery is allowed, with the need of the party seeking discovery for the requested material. The opinion correctly cites the Academy's interest in preserving the confidentiality of the application process. In evaluating the other side of the balance, the plaintiffs' need for discovery, the opinion then correctly notes that the "emphasis [of this inquiry] usually is on whether there are other, less burdensome means of getting the information that the party seeking discovery needs to prove his case." At that point, however, the majority opinion includes a single sentence that changes the entire focus of the inquiry: "But another consideration, less frequently emphasized but no less legitimate, is whether his case has any possible merit." *Ante*, at 6-7. Based on this sentence, the majority opinion then proceeds to devote the rest of its lengthy text to an analysis of the merits of the plaintiffs' antitrust suit in order, in its words, to determine "the benefit of discovery to the party seeking it."

In holding that the merit of the underlying lawsuit is a fundamental consideration for an appellate court determining whether a district court abused its discretion in assessing the benefit of granting discovery, the majority opinion disregards long-settled principles of civil procedure. After the complaint was filed, the Academy had moved to dismiss the suit on the grounds that the action was barred by the doctrine of res judicata and that the complaint failed to state a claim under the Sherman Act. In a published opinion, the District Court denied the motion. *Morrow v. American Academy of Orthopaedic Surgeons*, 496 F.Supp. 226 (N.D. Ill. 1980). Since this order was not a final one, the Academy could not then appeal the denial of the motion to dismiss unless the District Court certified its interlocutory order for immediate appeal under 28 U.S.C. § 1292(b). But the District Court declined to do so, and therefore the Academy could not seek appellate review of the merits of its case until after the entry of a final judgment. But the majority opinion today permits the Academy, and similarly situated parties in future cases, to secure immediate, appellate review of the merits of a lawsuit, prior to any discovery,

trial, or judgment, simply by disobeying a discovery order and subjecting themselves to the fine imposed for violating the order.

The majority opinion seeks to justify its unprecedented approach by relying upon cases in which the *District Court* had denied discovery relating to claims which were found to be probably groundless. *See Doe v. New York City Dept. of Social Services*, 649 F.2d 134, 147 (2d Cir. 1981); *Spier v. Home Ins. Co.*, 404 F.2d 896, 899-900 (7th Cir. 1968); *Downe v. Springfield School Comm.*, 340 F.Supp. 334, 335 (D. Mass. 1972). *Cf.* 4 Moore's Federal Practice ¶ 26.56 [1], pp. 26-124 - 26-125, & n.20 (Moore & Lucas eds. 1982) ("Ordinarily, the court will not determine whether the theory of the complaint is sound, or whether, if proved, would support the relief requested, in ruling on a discovery motion." (citing cases)) But, in the present case, the District Court did *not* determine that the suit was probably groundless. Rather, it *denied* the motion to dismiss and ordered discovery. Thus, in the guise of granting the District Court discretion to consider the merits of a suit in determining whether discovery is permissible, the majority opinion actually narrows the District Court's discretion by permitting a party to relitigate the merits of an unsuccessful motion to dismiss in an appeal from a criminal contempt judgment for failing to comply with a discovery order. Such a result will interfere with the District Judge's authority to control the discovery process and encourage the filing of interlocutory appeals in the heavily burdened federal appellate courts.

Because the District Court denied the motion to dismiss and did not certify its order for immediate review, this Court, as the majority ultimately acknowledges, *ante*, at 19-20, lacks jurisdiction to review the order denying the motion to dismiss. As a result, the discussion in the majority opinion of the merits of the parties' claims and defenses is purely advisory. Undaunted by this absence of jurisdiction, the majority opinion formulates a completely unprecedented expansion of the res judicata doctrine, inconsistent with existing law in several Circuits, including a

previous decision of this Court. Res judicata bars the relitigation in a subsequent suit between two parties concerning a single cause of action of all claims actually decided in the first suit as well as claims that could have been decided, but were not raised, in the earlier litigation. *Ante*, at 8. The plaintiffs in the present case earlier sued the Academy in an Illinois court claiming a right under Illinois law to a hearing on their application and to reasonable standards for membership. The Illinois court did not have before it a state or federal antitrust claim. Moreover, because, under long-settled precedents, the federal courts have exclusive jurisdiction over federal antitrust claims, *see Hammerstein's Bros. Adv. Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440 (1920), no federal antitrust claim could have been decided by the Illinois courts.

Because of the federal courts' exclusive jurisdiction over federal antitrust claims, several Circuits have stated that the doctrine of res judicata does not bar the litigation of a federal antitrust claim between parties who have participated in an earlier state court trial involving the same set of facts. *Hoopes v. Solomon*, 597 F.2d 958, 984 (6th Cir. 1979), *cert. denied*, 444 U.S. 1079 (1980); *Kurek v. Pleasure Driveway & Park District of Peoria*, 583 F.2d 376, 379 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Clark v. Wooster*, 513 F.2d 994, 997 (9th Cir.), *cert. denied*, 423 U.S. 840 (1975); *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759, 762 (2nd Cir. 1968); *see also*, Restatement (Second) of Judgments 61.2(1) comment c, illustration 2 (1972) ("A Co. brings an action against B Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred.")

One court, however, has carved out an exception to the prevailing rule. In *Nash County Bd. of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 979 (1981), the Court of Appeals for the Fourth Circuit held that a plaintiff who has maintained an action in

state court under a state antitrust statute that was identical to the federal antitrust statute was barred from instituting a subsequent federal antitrust action. But *Nash* expressly distinguished the case in which the state statute did not authorize recovery of treble damages in the same manner as the federal statute. *Id.* at 490. Because the Illinois antitrust statute differs from the federal antitrust laws in that it does not provide for the mandatory trebling of damages, *Nash*, as the majority opinion ultimately concludes, "does not speak directly to . . . this case." *Ante*, at 11. Until today, therefore, no court has ever barred a plaintiff from litigating a federal antitrust claim on facts similar to those of the present case, and several decisions have stated that a plaintiff may not be so barred.

The majority opinion justified reaching this unprecedented result by arguing that the plaintiffs should have resolved their dispute by instituting a federal antitrust suit and litigating all of their state claims as pendent claims in the federal action. *Ante*, at 12. According to the majority opinion, therefore, the doctrine of res judicata bars not only claims that were actually decided or could have been decided in the first suit, but also any claim that could have been decided had the plaintiffs chosen to bring their suit in a completely different forum. This expansion of the doctrine of res judicata contradicts the principle, fundamental to our legal system, that parties, not judges, choose the forum in which to resolve their differences and frame the claims advanced in their pleadings. Moreover, the majority opinion's analysis is based on the errant premise that by merely instituting a federal suit, a plaintiff may insist that a federal court decide any related state claim under the doctrine of pendent jurisdiction. "[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

The majority's novel analysis of the validity of the contempt citation also enables the Court to reach and "express its view" on the merits of the antitrust question at issue in the case, although, once again, the Court lacks

jurisdiction to dismiss the suit based on any such view. Because there has not yet been any discovery or a trial in this case, the majority opinion is obligated to conduct a "Rule of Reason" analysis of the defendant's activities, though there is not a single fact in the record to show the nature of the defendant's actions, the purposes of its conduct, the relevant geographic markets, or the effect of the defendant's conduct on these markets. It does so by speculating as to the effect of the defendant's conduct on the plaintiffs, *ante*, at 18, and on the market, *ante*, at 17. Speculation should not replace factual analysis in evaluating the merits of any lawsuit; it is a particularly inappropriate tool with which to evaluate a "Rule of Reason" antitrust claim.

I think the discovery order and the subsequent contempt citation did not represent an abuse of the trial judge's discretion. I disagree with the majority's decision to reach the merits of the underlying lawsuit and believe that its expansion of the doctrine of res judicata is highly dubious. Accordingly, I respectfully dissent.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2671

R. ANTHONY MARRESE, M.D. and
MICHAEL R. TREISTER, M.D.,

Plaintiffs-Appellees,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 1405—Milton I. Shadur, Judge.

ARGUED FEBRUARY 26, 1982—DECIDED MAY 11, 1983

Before PELL, *Circuit Judge*, STEWART, *Justice (Retired)*, and POSNER, *Circuit Judge*.*

POSNER, *Circuit Judge*. This is an appeal from a judgment for criminal contempt for disobeying a discovery order. The appeal was originally decided by this panel in an opinion published at 692 F.2d 1083 (7th Cir. 1982), with Justice Stewart dissenting, *id.* at 1096. Rehearing *en banc* was granted, but shortly before argument was

* Judge Sprecher was originally the third member of the panel, but his untimely death prevented his participation in the decision of this case. Judge Posner took his place and read the briefs and pertinent portions of the record and listened to the tape recording of the oral argument.

scheduled to be heard it became apparent that the reservations of the judges who had voted to rehear the case concerned the breadth of the panel's majority opinion, and that if the panel majority was willing (as it was) to write a more narrowly focused opinion, *en banc* consideration could be obviated. This is that opinion. It has been circulated to all the members of the court in regular active service so that the court could decide, not whether it wants to adopt this opinion as the opinion of the court *en banc*, but whether it wants to go ahead with the scheduled *en banc* rehearing of the prior opinion; and the court by majority vote has decided to vacate the order granting rehearing *en banc*.

The American Academy of Orthopaedic Surgeons is a private association to which most orthopaedic surgeons in the United States belong. The plaintiffs, two orthopaedic surgeons practicing in Evansville, Indiana, and Chicago, respectively, were denied membership in the Academy without a hearing or a statement of reasons. Although membership in the Academy is alleged to confer certain professional advantages, it is not a prerequisite either to being certified to practice as an orthopaedic surgeon or to obtaining hospital staff privileges; each of the plaintiffs is certified to practice orthopaedic surgery, and has staff privileges at several hospitals.

The plaintiffs first sued the Academy in an Illinois state court, claiming a right under Illinois law to a hearing on their application and to reasonable standards for membership. They lost; the Illinois Appellate Court held that the complaint failed to state a claim because membership in the Academy is not an "economic necessity." *Treister v. American Academy of Orthopaedic Surgeons*, 78 Ill. App. 3d 716, 755-56, 396 N.E.2d 1225, 1252 (1979). They then sued the Academy in federal district court, seeking injunctive relief and damages under section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint alleged that the Academy is "a monopoly in its field, possessed of substantial power to control the market for orthopaedic surgical services,"

and that the plaintiffs, though fully qualified for membership under the announced criteria of the Academy, were denied membership for "extraneous" reasons, which in the case of Dr. Treister (no particulars were given for Dr. Marrese) included "(a) his supposed willingness to offer expert testimony against other orthopaedic surgeons in medical malpractice cases; (b) his known willingness to consult surgical out-patients on a relatively high-volume basis; and (c) his nonconformity of personality and personal attitudes with those of most established orthopaedic surgeons and in particular those who were already members of the academy." The complaint alleged that the effect of denying the plaintiffs' applications for membership had been "to limit competition and enforce conformity with current business practices" and to injure the plaintiffs in the practice of their profession.

Discovery began. The plaintiffs asked the Academy to produce all of its correspondence and other documents relating to the denial of the plaintiffs' applications for membership and to all other denials of membership applications between 1970 and 1980. The Academy refused, even after the court ordered it to produce the requested documents. The court held the Academy in criminal contempt and fined it $10,000, and this appeal followed.

The Academy asks us to hold that the discovery order was improper, but the plaintiffs point out that it is not a final order and argue that we cannot review it because the district court has not certified it for an immediate appeal under 28 U.S.C. § 1292(b). The contempt judgment, however, is a final order, reviewable by us; and if a party is willing to pay the price of being punished for contempt or suffering an equivalent sanction — such as dismissal of the complaint if the validity of the order he has disobeyed is ultimately upheld, he may get immediate review of that order by appealing from the contempt judgment. E.g., *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Ryan v. Commissioner of Internal Revenue*, 517 F.2d 13, 19-20 (7th Cir. 1975); *Hawley v.*

McHugh Constr. Co., 419 F.2d 955, 957 (7th Cir. 1969); *National Util. Serv., Inc. v. Northwestern Steel & Wire Serv., Inc.*, 426 F.2d 222 (7th Cir. 1970); *Hastings v. North East Independent School Dist.*, 615 F.2d 628, 631 (5th Cir. 1980).

True, some cases hold, in apparent contradiction to the above, that where as in this case the judgment is for criminal rather than civil contempt the validity of the underlying order may not be questioned on appeal from the contempt judgment. E.g., *United States v. United Mine Workers of America*, 330 U.S. 258, 291-94 (1947); *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1356 (5th Cir. 1978). Yet our decision in *Hanley*, for example, involved criminal contempt; and the two lines of cases can be reconciled, see *Hanley v. McHugh Constr. Co.*, *supra*, 419 F.2d at 957; *United States v. Ryan*, *supra*, 402 U.S. at 532 n.4; 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3537, at pp. 340-41 (1975), by noting that in the cases where the validity of the underlying order was held not to be reviewable on appeal from the judgment of contempt the order could have been appealed as of right directly, which discovery orders cannot be. The right to have a discovery order reviewed on appeal from a contempt judgment thus serves as a safety valve in the final-judgment rule of 28 U.S.C. § 1291. Such an order may impose heavy and irrecoverable costs on a party; yet to make discovery orders appealable as of right would lead to unacceptable delays in federal litigation. Confining the right to get appellate review of discovery orders to cases where the party against whom the order was directed cared enough to incur a sanction for contempt is a crude but serviceable method of identifying the most burdensome discovery orders and waiving the finality rule only for them.

The validity of the discovery order that the Academy disobeyed is therefore properly before us. Rule 26(c) of the Federal Rules of Civil Procedure empowers the district court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that discovery not be had . . . ." and Rule 26(d) empowers the court, "upon motion, for the convenience of parties and witnesses and in the interests of justice," to control by order the sequence and timing of discovery. Although the effective management of complex litigation requires that the district judge be allowed broad discretion in guiding the discovery process and therefore in exercising his powers under Rules 26(c) and (d), *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1240 (6th Cir. 1981), his discretion is not unlimited, and if we have a firm conviction that he has made a mistake we must reverse, *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977).

In ruling on a motion to limit discovery the district judge must compare the hardship to the party against whom discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery if discovery is denied. He must consider the nature of the hardship as well as its magnitude, and thus give more weight to interests that have a distinctively social value than to purely private interests. He must go through the same analysis under Rule 26(d) except that obviously an order merely postponing a particular discovery request should be granted more freely than an order denying the request altogether. The hardship to the party seeking discovery is less if he is just being told to complete his other discovery first (or just to let the other party have some discovery first) than if he is being told to do without forever.

In an effort to show that more than purely private interests are at stake, the Academy argues that its correspondence and other documents relating to denials of applications for membership are protected by the First Amendment. This argument, if meant to establish a complete immunity from discovery of these materials in a lawsuit, is untenable. See, e.g., *Memorial Hospital for McHenry Cty. v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) (per curiam), rejecting a claim of privilege for a hospital's records of disciplinary proceedings against

staff physicians. Even if the Academy were engaged in advocating controversial views and the publication of its internal files would expose members to retaliation for those views, it would not have an absolute privilege against discovery, though the plaintiffs would then have the burden of showing that the information sought was essential to their case and unobtainable by other means that would be less likely to discourage such advocacy. *See Hastings v. North East Independent School Dist.*, *supra*, 615 F.2d at 632; *In re Petroleum Prods. Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982); *Gray v. Board of Educ. of City of N.Y.*, 692 F.2d 901, 905-06 (2d Cir. 1982).

Yet there is in this case, if not a First Amendment right, at least a First Amendment interest—maybe two First Amendment interests—which the discovery sought by the plaintiffs would impair and which differentiates this from the usual antitrust case, where discovery is sought of invoices or salesmen's reports or the minutes of a corporation's board of directors. The Academy is a forum for exchanges of information about surgical techniques and related matters of substantial public interest. These exchanges may be inhibited if the Academy has to disclose its membership files. The protective order that the district judge entered is not a complete answer, not only because it is the kind of lawyers' arrangement that laymen instinctively distrust but also because the particular order allows the plaintiffs themselves, and not just their counsel—allows, in other words, two disappointed applicants for membership—to get hold of their files. If the Academy complies with the discovery order its members may be reluctant to offer candid evaluations of applicants in the future, and the atmosphere of mutual confidence that encourages a free exchange of ideas will be eroded. Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), where in a case involving resistance to disclosure of membership information in discovery proceedings the Supreme Court recognized a First Amendment right of association for the purpose of expression and advocacy of ideas. And setting aside constitutional considerations, one should

not have to raise the ghosts of Aristotle and de Tocqueville to be reminded that voluntary associations are important to many people. Americans in particular, that voluntary professional associations are important to American professionals (a proposition that is the premise of the plaintiffs' antitrust suit as it was of their Illinois suit), that confidentiality of deliberations on membership applications is essential to the voluntary character of an association, and therefore that the involuntary disclosure of the membership files of a voluntary association may harm worthy private interests.

Although disclosure of the files sought by the plaintiffs would thus be costly, nondisclosure might make it impossible for them to prove their antitrust case or even to discover whether they have a meritorious case. Since the interest in the confidentiality of an association's membership deliberations is not absolute, the balance of hardships may therefore seem even. But Rule 26(d) of the Federal Rules of Civil Procedure (control of the sequence and timing of discovery) provides a method of accommodating the competing interests with minimal damage to either. If there is other discovery that the plaintiffs must complete in order to be able to resist a motion by the defendant for summary judgment, and thus a significant chance that the plaintiffs' case will fail regardless of what the internal files that they are seeking may show, the district judge should use his power under Rule 26(d) to require the plaintiffs to complete the other, nonsensitive discovery first. His power to do so cannot be questioned. *See* 8 Wright, Miller & Cooper, Federal Practice and Procedure §§ 2040, 2047 (1970). Nor, we think, his duty, in an appropriate case. As the First Circuit stated recently in dealing with the related question of discovery of newsmen's confidential sources, "As a threshold matter, the court should be satisfied that a claim is not frivolous, a pretense for using discovery powers in a fishing expedition. In this case, plaintiff should show that it can establish jury issues on the essential elements of its case not the subject of the contested discovery." *Bruno & Stillman Co. v. Globe News-*

paper Co., 633 F.2d 183, 197 (1st Cir. 1980) (emphasis added).

Discovery of sensitive documents is sometimes sought not in a sincere effort to gather evidence for use in a lawsuit but in an effort to coerce the adverse party, regardless of the merits of the suit, to settle it in order not to have to disclose sensitive materials. The use of the liberal discovery provisions of the Federal Rules of Civil Procedure to harass opponents is common, and requires the vigilance of the district judges to prevent. The power granted by Rule 26(d) to control the sequence and timing of discovery is one of the district courts' too little used tools for preventing the predatory abuse of discovery and we are at a loss to understand why the power was not used here. "[J]udges should not hesitate to exercise appropriate control over the discovery process." *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

Of course, if the plaintiffs did not need anything beyond the contents of the Academy's membership files to prove their case, there would be no other essential discovery they could be asked to do before getting access to the Academy's files. But it does not appear that the plaintiffs are attempting to prove a per se antitrust offense that would be complete if the Academy's files showed that the Academy had an anticompetitive motive in denying their applications for membership. The denial was a collective refusal by the Academy's members to deal with the plaintiffs on the identical terms on which they deal with each other, and hence a boycott. Although it used often to be said that boycotts were illegal per se, that was never entirely true. The best known statement of the Rule of Reason is found in a boycott case, *Board of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918), which involved the legality of an internal rule of a commodities exchange designed to limit competition from some of its members, a rule whose violation would have been punishable by expulsion. In any event, it is clear today that boycotts are illegal per se only if used to enforce agreements that are themselves illegal per se—for example, price-fixing agreements. See *United States Trotting Ass'n v. Chicago Downs Ass'n*, 665 F.2d 781, 787-90 (7th Cir. 1981) (en banc), for the general principle, and *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234-36 (7th Cir. 1982), cert. granted, 51 U.S.L.W. 3627 (March 1, 1983), for the price-fixing exception. At least that is the rule for organized associations having some lawful purposes; we need not decide whether a conspiracy or other ad hoc "association," if anticompetitive in intent, would be treated under a harsher standard.

True, some cases such as *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912), hold or imply that a boycott that totally excludes a competitor from a market is, for that reason alone, illegal; and that could be viewed as a species of per se illegality. Since there has been, at least as yet, no suggestion that the American Academy of Orthopaedic Surgeons has the power to prevent anyone from practicing orthopaedic surgery, these cases are of doubtful relevance. And there is a question to what extent, with their emphasis on the welfare of competitors rather than consumers (the excluded railroad in the *Terminal Ass'n* case appears to have been complaining about its exclusion from a cartel), they can survive the consumer-oriented view of antitrust that prevails today. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). Reviewing them recently, this court held that boycotts cannot be deemed illegal per se on the basis of their impact on competitors rather than on the consuming public, if there is no "direct effort to influence the supply of, or demand for, a competitor's product." *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, Inc.*, 672 F.2d 1280, 1288 (7th Cir. 1982). None is alleged in this case. The plaintiffs are competitors of Academy members, and membership may be valuable in competing with both member and nonmember orthopaedists, but there is no contention that the Academy is interfering directly with the plaintiffs' access to suppliers or customers, as by trying to get their hospital staff privileges revoked. The alleged effect of denial of membership on the plaintiffs' ability to practice orthopaedic

medicine is indirect, just as denying a trial lawyer membership in the American College of Trial Lawyers would have only an indirect effect on his ability to obtain clients. We are speaking of matters of degree of course, but an "indirect" effect, by which we mean one falling far short of complete exclusion from the market, will not support a *per se* attack on a boycott.

Nor do the plaintiffs allege a price-fixing conspiracy among orthopaedic surgeons, a conspiracy to which the exclusion of the plaintiffs from membership in the Academy might be ancillary. Even if, as we very much doubt, a price-fixing allegation could be teased out of the statement in the complaint that Dr. Treister is willing "to consult surgical out-patients on a high-volume basis"—"high volume" perhaps implying low price—the plaintiffs have given no indication of wanting to rest their entire case on this tenuous link to the *per se* doctrine. They want to go further and prove a boycott that is illegal if at all only under the Rule of Reason, and to do that they will have to prove at trial some "anticompetitive market effect" from the boycott. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981); *Doe Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1352 (7th Cir. 1982); *Masonry of America, Ltd. v. Shell Oil Co.*, 628 F.2d 649, 650 (7th Cir. 1980). As in *Phil Tolkan Datsun*, *supra*, 672 F.2d at 1287, "we decline to accept plaintiff's apparent contention that any denial of membership by an ongoing trade association constitutes a *per se* violation . . . . [M]embership restrictions by trade organizations not possessed of significant economic or operational leverage are more appropriately evaluated according to the standards of the rule of reason." And, of course, what is "significant economic or operational leverage" is a matter of proof too.

Thus, to get over the hurdle of a defense motion for summary judgment at the completion of pretrial discovery the plaintiffs will have to have other evidence besides whatever dubious morsels they may find in the Academy's files on denials of membership applications. They do not have the other evidence yet, though they

may get it through additional discovery. According to their counsel the vast majority of the nation's orthopaedic surgeons who have been practicing orthopaedic medicine for at least three years (one of the plaintiffs' counsel said 99 percent) are members of the Academy, and it has 10,000 members in all. The plaintiffs do not suggest that the Academy places any restrictions on its members. Even the Academy's meetings are open to nonmembers, though the plaintiffs object, frivolously as it seems to us, to having to wear nonmember badges. This does not appear to be a case where an association is making a "direct effort to influence the supply of, or demand for, a competitor's product." *Phil Tolkan Datsun*, *supra*, 672 F.2d at 1286.

In these circumstances, if all of the Academy's members were in the same market the consumer interest in effective competition could not be seriously harmed by the exclusion of the plaintiffs and others like them—not that such exclusion is in the cards: the plaintiffs do not argue that the Academy controls entry into the practice of orthopaedic surgery. Ten thousand is a vast number of competitors. Unless they explicitly agreed not to compete and backed up the agreement with enforcement machinery to prevent individual members from cheating, the consumer would be assured the benefits of buying in a competitive market. And though there is a sense in which the exclusion of any competitor reduces competition, it is not the sense of competition that is relevant to antitrust law. *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663-64 (7th Cir. 1982); *University Life Ins. Co. of America v. Unimarc Ltd.*, 699 F.2d 846, 853 (7th Cir. 1983). The policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors, and a consumer has no interest in the preservation of a fixed number of competitors greater than the number required to assure his being able to buy at the competitive price. Maybe the older, competitor-protection view would survive in a case of naked aggression resulting in the total exclusion of a competitor from the market, but that would be a *per se* case (if anything) and this is not.

The 10,000 members of the Academy do not, however, all compete in the same market. Assume that the market for orthopaedic surgery is local—that Dr. Marrese competes with other orthopaedists in Evansville, Dr. Treister with other orthopaedists in Chicago. The plaintiffs will still have the burden at trial of showing that in these local markets the number of orthopaedic surgeons who belong to the Academy is so few that competition among them—competition that the Academy apparently does not attempt to limit or regulate—cannot be relied on to give the consuming public the benefits of competition. Unless they can show this they will be unable to ask the trier of fact to draw an inference that either the exclusion of an individual orthopaedist from a local market or the possible effect of that exclusion on the competitive behavior of other aspirants to membership could result in a higher price or lower quality of orthopaedic surgery in these communities.

The plaintiffs have made no effort yet in discovery to show a probable anticompetitive effect along the foregoing lines or any others, nor have they yet laid an adequate predicate for a *per se* theory of liability. We emphatically do not decide that they will not be able to make the required showing; since discovery is not yet complete, all statements of fact in this opinion are tentative. But at this early stage of the case, where virtually the only facts of record bearing on competitive effect are that the Academy has thousands of members, does not regulate their behavior, and does not control entry, the plaintiffs cannot be said to have made the required showing. The district court should not in these circumstances have ordered discovery of the Academy's membership files before there was any discovery on the issue of competitive effect. It was not enough for the court to observe that "nothing in the Federal Rules of Civil Procedure or the case law requires the imposition of such a bifurcation [of discovery] on plaintiffs." As we have pointed out, a district court has the power under Rules 26(c) and (d) of the Federal Rules of Civil Procedure, and in a clear case the duty, to defer a burdensome discovery request pending completion of discovery

on an issue that may dispose of the entire case and thereby make the request moot. We are speaking here only of postponement, and not of denial, of discovery. There would have been no hardship to the plaintiffs in requiring them to conduct their discovery on competitive effect before getting into the Academy's membership files. The sequence of discovery may well have been intended to coerce the Academy to settle but in any event the balance of hardships is clear enough to make us conclude that in refusing to postpone discovery of the membership files the able district judge committed clear error.

The judgment of criminal contempt is therefore reversed. Although the Academy also asks us to order the complaint dismissed on grounds of *res judicata*, the district judge's denial of the Academy's motion to dismiss was an interlocutory order appealable only under 28 U.S.C. § 1292(b), which requires the district judge to certify in writing that he is "of the opinion that [the order] involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." Rightly or wrongly, the judge refused to make the certification, and we therefore have no jurisdiction to review his interlocutory order. *In re Watkins*, 271 F.2d 771 (5th Cir. 1959).

REVERSED.

STEWART, *Justice (Retired)*, dissenting.

Much that is said in the opinion of the Court strikes me as correct. Specifically, I agree that a district court has the power, and sometimes the duty, under Rules 26(c) and (d) of the Federal Rules of Civil Procedure, to defer a burdensome discovery request pending completion of discovery on an issue that may dispose of the entire case. But for reasons stated in my dissent from the Court's original opinion, *see* 692 F.2d, at 1097-1098, I cannot agree with the Court's ultimate conclusion that

the District Court's refusal to postpone discovery of the Academy's application files in this case was "clear error."

At the heart of the controversy before us is the conflict between the Academy's legitimate concern for preserving the confidentiality of its records, and the appellants' need for evidence with which to prove their antitrust claim. The Academy's interest, however characterized, in preserving the secrecy of its deliberations is substantial. If those charged with determining the qualifications of applicants to membership in a professional organization cannot be assured that their evaluations will remain confidential, they may be less than candid in their assessments, and the organization's legitimate interest in limiting its membership to qualified persons may be impaired.

The District Court was fully cognizant of these concerns. In its order denying the Academy's request to delay discovery of its files, the District Court explicitly acknowledged that public disclosure of the contents of the application files would have a "chilling effect" on the Academy's future deliberations. But the District Court also determined that the sought-after materials were critically important to appellees' case and therefore declined to "bifurcate" the proceedings. Instead, the District Court imposed a protective order strictly limiting appellees' access to the application materials, finding that "[u]nder those restrictive conditions, the confidentiality of the Academy's admission process is largely preserved."

As the Court acknowledges, a district judge must have substantial discretion in controlling how cases proceed in the district court. That discretion is particularly broad with respect to discovery. *See e.g., Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977). If the authority of the district courts to dispose of discovery matters is to be preserved, an appellate court may not interpose its judgment on such matters unless the lower court's decision leaves it with the firm conviction that a mistake has been made.

In this case, the District Court carefully considered the competing interests and reasonably determined that they could best be accommodated through discovery pursuant to a restrictive protective order. Other judges could reasonably reach other conclusions, but I cannot say that the decision before us was an abuse of discretion. Accordingly, I respectfully dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 12, 1984

Before

Hon. RICHARD A. POSNER, Circuit Judge

Nos. 81-2671 and 83-2683	)	
R. ANTHONY MARRESE, M.D., and MICHAEL R. TREISTER, M.D.,	)	Appeals from the United States District Court for the Northern District of Illinois Eastern Division No. 80 C 1405 Judge Milton I. Shadur
Plaintiffs-Appellees	)	
vs.	)	
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendants-Appellant.	)	

On consideration of "MICHAEL R. TREISTER'S MOTION TO STAY THE MANDATE OF THIS COURT'S JANUARY 3, 1984, DECISION" filed herein on January 6, 1984, by counsel for plaintiff-appellee, Michael R. Treister,

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this court is STAYED to and including March 5, 1984.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D. and MICHAEL P. TREISTER, M.D.,	)	
Plaintiffs,	)	No. 80 C 1405
v.	)	
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

OPINION AND ORDER
(September 3, 1980)

Defendant American Academy of Orthopaedic Surgeons ("Academy") has moved to dismiss the Amended Complaint (the "Complaint") filed by plaintiffs R. Anthony Marrese and Michael R. Treister (respectively "Dr. Marrese" and "Dr. Treister"). For the reasons stated in this opinion and order the Academy's motion is denied.

Plaintiffs' Amended Complaint

Drs. Marrese and Treister are Board-

certified practicing orthopaedic surgeons. They complain of allegedly having been arbitrarily excluded, by procedures amounting in legal effect to a group boycott, from membership in the Academy.

Although Academy membership is not a condition to practice as an orthopaedic surgeon, the Academy is characterized by the Complaint as "in a word, a monopoly in its field, possessed of substantial power to control the market for orthopaedic surgical services, especially by denying access to any of the various subspecialty organizations of the practice." Appendix A to this Opinion sets forth Paragraphs 8-12 of the Complaint, the principal allegations dealing with the claimed significance of membership or non-membership in the Academy.

Prior Illinois Proceedings

Most of the Academy's attack on the Complaint is based on Drs. Marrese and Treister having sued in the Illinois courts on virtually the same set of facts alleged in the Complaint--with important exceptions stemming from the lack of jurisdiction in the state courts to enforce the federal antitrust laws. In their Illinois actions Drs. Marrese and Treister sued separately for declaratory relief as to the claimed illegality of the Academy's hearing procedures in denying them membership.

Dr. Treister's complaint was ultimately dismissed with prejudice for failure to state a cause of action, by a 2-1 decision of the Illinois Appellate Court.[1/] Dr.

1/ Treister v. American Academy of Orthopaedic Surgeons, 78 Ill. App. 3d 746, 396 N.E. 2d 1225 (1st Dist. 1979).

Marrese's separate complaint had been stayed by the Circuit Court of Cook County pending the Treister appeal. Though the parties are in dispute as to the final disposition of the Marrese case, this Court will assume for purpose of this opinion that it has been or will be similarly dismissed with prejudice.

Memorandum Filed by the Parties

Counsel have provided the Court with more than 135 pages of briefs (sic!). Eighty-five of these pages reflect the Academy's efforts to set aloft a cluster of barrage balloons to prevent what it views as plaintiffs' proposed raid on the fellowhip of the Academy.

This Court will not seek to emulate either party in length of discussion. It will instead deal as briefly as possible with the effect of the two critical elements that let the air out of the Academy's

ba'loons:

1. Federal courts have exclusive jurisdiction over the federal antitrust laws.
2. Dr. Treister's Illinois lawsuit was disposed of on a motion to dismiss and not after a hearing on the merits.

Res Judicata and Collateral Estoppel

There can of course be no difference between the parties as to the essential principles of the doctrine of res judicata and collateral estoppel. As another Judge of this Court put it briefly in Batiste v. Furnco Construction Co., 350 F. Supp. 10, 14 (N.D. Ill. 1972):

> Res judicata usually means that when a court of competent jurisdiction has rendered a final judgment on the merits of an action, equity will bar a subsequent suit between the same parties on the same cause of action not only as to matters which were decided but also as to those matters which might have been decided.

And if the identity of actions is not sufficient to invoke res judicata, principles of collateral estoppel operate in the manner expressed by the Restatement (Second) of the Law of Judgments (the "Restatement") § 68 (Tent. Draft No. 4, 1977) (emphasis added):

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

1. Res Judicata

Res judicata cannot apply here by its very definition. No federal antitrust claim was in fact decided by the Illinois courts on the merits. It is equally clear that, because of their lack of jurisdiction to do so, no federal antitrust claim "might have been decided" by the Illinois courts

--because for that purpose they are not courts of "competent jurisdiction." As our Court of Appeals succinctly put the legal principle in a related (though factually distinguishable) context, Kurek v. Pleasure Driveway & Park District of Peoria, 583 F. 2d 378, 379 (7th Cir. 1978):

> Defendants' arguments that the antitrust claims have been adjudicated in state court proceedings are insupportable both because the state courts have not in fact purported to do so, and because jurisdiction of federal antitrust suits is exclusively in the federal courts.

It is that fact that makes inapplicable the principal precedents on which the Academy seeks to rely: cases in which earlier proceedings in a federal court (one by definition having the power to adjudicate federal antitrust claims) were held to preclude later antitrust suits whether or not the first court had actually

decided such a claim. [2/] In that respect Judge Decker's opinion in Lincoln National Bank v. Lampe, 414 F. Supp. 1270, 1279-80 (N.D. Ill. 1976), dealing with a like argument in the securities field, might well have been written for this case:

> Despite the extensive treatise on res judicata submitted in the defendant's memorandum, it fails to address the implication of the statutory provision of § 27 of the 1934 Act which vests exclusive jurisdiction for violations of that Act in the federal courts. Furthermore, § 28 of the same Act provides that the remedies under the Act are given in addition to any other remedies existing in law or equity. Thus it appears that plaintiff could neither bring its 1934 Act claim before the Circuit Court, nor is it barred from seeking additional relief under that Act in federal court.

2/ See Martino v. McDonald's System, Inc., 598 F. 2d 1079 (7th Cir. 1979); Green v. American Broadcasting Cos., Inc., 572 F.2d 628 (8th Cir. 1978); and Norman Tobacco & Candy Co., Inc. v. Gillette Safety Razor Co., 295 F. 2d 362 (5th Cir. 1961).

That this accurately reflects the general law in this field is confirmed by the squarely applicable language of Section 61.2(1)(c) of Tentative Draft No. 5 (1978) of the Restatement, and even more specifically by Official Comment (1) thereon and Illustration 2 thereunder (from which the present case follows a fortiori):

> A. Co. brings an action against B. Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred.

In this Court's view Judge Merhige's opinion in Nash County Board of Education v. Biltmore Co., 464 F. Supp. 1027 (E. D. N.C. 1978) may be distinguished from this case because of what he characterized (464 F. Supp. at 1030) as the manner in which

"the North Carolina antitrust enforcement mechanism almost completely mirrors its federal counterpart, especially with respect to the availability of treble damages." In any case, however, this Court does not agree that the approach suggested by Judge Merhige ought to apply here as against the principles announced and applied in Judge Learned Hand's opinion in Lyons v. Westinghouse Electric Corp., 222 F. 2d 184, 189 (2d Cir. 1955); or in Cream Top Creamery v. Dean Milk Co., 383 F. 2d 358 (6th Cir. 1967); or in the Lincoln National Bank and Kurek cases previously cited; or in the Restatement; cf. Butterman v. Steiner, 343 F. 2d 519, 520 (7th Cir. 1965).

2. Collateral Estoppel

As for collateral estoppel, the teaching of that doctrine (again to quote the Restatement) is that the effect of the Illinois litigation is limited to "questions of

fact or law actually litigated and determined" in the first action between the parties. There is thus a critical difference between an earlier case in which the parties have gone to trial or otherwise had a factual determination and a case, like the Illinois cases here, disposed of on a motion to dismiss the complaint--that is, on questions of law.

Illinois has decided that the facts there alleged by Drs. Marrese and Treister were not sufficient as a matter of law to state a cause of action under Illinois law. 3/ Indeed the entire concept of a

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3/ For example, it is disingenuous to assert, as the Academy does, that the Illinois court "found that membership in the Academy was not an economic necessity." What the Illinois court determined was (1) that an allegation of "economic necessity" was necessary to support a cause of action under Illinois law and (2) that the Illinois complaint was deficient for lack of a sufficient allegation in that respect--something very different indeed from the Academy's assertion.

motion to dismiss is not that plaintiffs' allegations have or have not been determined to be true, but rather than even assuming them to be true plaintiff has no legal right to relief. 4/

Thus the issue that has really been adjudicated between the parties is that the Academy's conduct complained of by Drs. Marrese and Treister afforded no remedy under Illinois law. There has been no "issue of fact [essential to the judgement] ...actually litigated and determined by"

4/ This analysis is dispositive of all of the Academy's arguments as to the issues allegedly "adjudicated" in the Illinois case, which Drs. Marrese and Treister would then be estopped from relitigating.

the Illinois courts. 5/ This Court is of course free to determine whether the

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5/ Only one case cited by the Academy deals with this proposition in any respect, Florasynth Laboratories, Inc. v. Goldberg, 191 F. 2d 877 (7th Cir. 1951). There the Court considered the effect of a prior District Court decree dismissing a trademark and unfair competition complaint. Although the Court spoke in res judicata terms, the principle actually applied was that of collateral estoppel (since plaintiff was complaining in the second action of allegedly tortious acts occurring after entry of the judgment in the first action). As the Court said, 192 F. 2d at 880:

> It is fundamental that material facts or questions judicially determined in one action by a judgment may not be tried in a subsequent action between the same parties or their privies, whether the second action is upon the same or a different cause of action as the earlier action.... The findings and conclusions of the Court on questions necessarily in issue on such a motion are just as binding as if the questions had been decided after a trial of such issues. (citations omitted)

Unlike the situation here, the Court in the earlier action had determined that precisely the same kind of conduct alleged in the second action was not actionable on the same grounds sought to

federal antitrust laws are breached by that same conduct. Nothing the Illinois Appellate Court has said did--or could--decide that issue. 6/

Antitrust Issues

Because we are at the threshhold pleading stage, the test to be applied to the sufficiency of the Complaint is that stated in Conley v. Gibson, 355 U.S. 41,

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be charged in the second action. It was that determination of an issue of law that was necessarily "just as binding as if the questions had been decided after a trial of such issues."

6/ Presiding Judge Seymour Simon, a distinguished practitioner in the federal antitrust field long before he took the bench, dissented in the Illinois Appellate case, 396 N.E. 2d at 1234. Justice Simon's opinion urged an approach to Illinois law closely related to principles of federal antitrust jurisprudence. But his inability to persuade his colleagues does not of course convert their majority holding into a decision under the federal laws--a decision they had no jurisdiction, and did not purport to make.

45-46 (1957):

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

While this Court is thus not expressing its views as to whether Drs. Marrese and Treister can ultimately sustain the burdens of proof they have undertaken by their Complaint, it upholds the Complaint against the several attacks contained in the Academy's motion and supporting memoranda:

1. Claims based on plaintiffs' alleged lack of standing to sue under the federal antitrust laws are ill-founded. They are based on a mistaken view of the "target area" concept, because plaintiffs are claiming direct damage to their "business" as surgeons as the result of the Academy's alleged antitrust violations. This charge is in turn based on the adequately alleged

nexus between lack of Academy membership and plaintiffs' competitive disadvantage in the practice of orthopaedic surgery.

2. Though often conclusory in nature, the allegations of the Complaint are no more so than is contemplated by the "notice pleading" approach of the Federal Rules of Civil Procedure. See for example Complaint Paragraphs quoted in Appendix A and the allegations of Complaint Paragraphs 49-63.

3. As for the Academy's claim that there are no adequate allegations of a "group boycott,"-the allegations just referred to are plainly sufficient to overcome the Academy's motion to dismiss.

4. There is some limited case support for the Academy's argument that the Complaint fails adequately to allege a conspiracy. Several decisions involving ordinary business corporations have held

that antitrust claims cannot be premised on a "conspiracy" between such a corporation and its own officers. Those decisions are of course distinguishable from the situation involving an association (an entity separate from its constitutent members); but one decision (Hatley v. American Quarterhorse Association, 552 F. 2d 646, 654 n. 7 (5th Cir. 1977)) has extended that concept to a trade association. In the opinion of this Court, that analysis cannot fairly apply to an association such as the Academy, and this Court declines to follow Hatley. Where the necessary anti-competitive allegations are present, the very fact that an association of competitors is involved and enforces its activities by by-laws or similar internal means is itself sufficient to ground an antitrust complaint. As then District Judge (now Circuit Judge)

Harlington Wood, Jr. said in McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008, 1017 (S.D. Ill. 1974), aff'd by unpublished order 506 F. 2d 1404 (7th Cir. 1974):

> The Defendants' contention is not well taken. The requisite agreement needed to bring the activity in question within the ambit of the Sherman Act is provided by the very bylaw under which the Defendants are alleged to have acted. In Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed. 2d 389 (1963), the Supreme Court found the bylaws of the Exchange pursuant to which the Plaintiffs' direct wire privileges were suspended provided the sufficient "agreement". As stated in one comment, "The mere involvement of an association generally would provide the requisite element of combination or conspiracy."

This is but one of a veritable host of cases, including Silver v. New York Stock Exchange, 373 U.S. 341 (1963), that have found the requisite "conspiracy" and sustained antitrust claims against associations

alleged to have engaged in exclusionary or other anticompetitive practices.

5. Much of the same analysis applies to reject the claim that "the Complaint merely alleges a unilateral refusal to deal." That claim reflects too narrow and formalistic--and unrealistic--a view of the Academy as a single entity distinct from its membership.

6. Freedom of association concepts cannot serve as a protective mantle for the anticompetitive conduct alleged in the Complaint. Associated Press v. United States, 326 U.S. 1 (1945), though it involved a different type of antitrust violation, is of course the classic illustration of that proposition.

Conclusion

Defendant Academy's motion to dismiss the Amended Complaint is denied, and the

Academy is ordered to file its answer on or before September 24, 1980.

Milton I. Shadur
United States District Judge

Date: September 3, 1980

APPENDIX A

8. Defendant, Academy, is the sole generally recognized organization of its kind in the orthopaedic surgical profession and freely holds itself out to be such. It is closely affiliated with the American Medical Association, which officially recognizes the Academy as the spokesman for all orthopaedists.

9. In turn, although the American Board of Orthopaedic Surgery (ABOS) certifies orthopaedic surgeons, the Academy was largely responsible for the formation of that certifying body and continues to be intimately involved with it through, among other things, interlocking boards of directors. All members of the board of directors of ABOS are also present or past members of the board of the Academy, and the Academy is empowered by the ABOS to nominate the candidates for the latter's board.

10. The Academy is, in a word, a monopoly in its field, possessed of substantial power to control the market for orthopaedic surgical services, especially by denying access to any of the various subspecialty organizations of the practice.

10A. On information and belief, membership in the Academy is a requirement for membership in most of the above subspecialty organizations including, among others, the American Orthopaedic Foot Society and the American Orthopaedic Society for Sports Medicine.

11. Active fellowship in the Academy is a factor relied upon by hospitals in the granting of orthopaedic surgical privileges, by physicians in making referrals of patients' cases, by insurance companies in the setting of malpractice insurance premiums, by courts and other adjudicative panels in determining the expertise of orthopaedic

surgeons whose testimony is offered as expert witnesses, and by aspiring orthopaedic surgeons choosing a clinic in which to practice.

11A. Members enjoy significant competitive advantages over nonmembers in regard to advancement, and particularly sustained, long-term advancement, in the orthopaedic surgical profession.

12. Conversely, rejection for Academy membership, which must be disclosed to hospitals where staff privileges are sought, to insurance companies whose liability coverage is sought, to other professional societies to which admission is sought, and to any court or similar authority in response to questions about an expert witness's qualifications, is a subject of suspicion and disgrace.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D., et al.,	)	
Plaintiffs,	)	No. 80 C 1405
v.	)	
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER
(August 17, 1981)

On August 13, 1981 our Court of Appeals dismissed the appeal of defendant American Academy of Orthopaedic Surgeons ("Academy") from this Court's order denying Academy's motion for a preliminary injunction seeking to bar discovery by plaintiffs R. Anthony Marrese and Michael R. Treister ("Drs. Marrese and Treister"). In note 1 of its unpublished order in No. 81-1570 (7th Cir. Aug. 13, 1981) the Court invited reconsideration of the prior order of this

Court, 496 F.Supp. 236 (N.D. Ill. 1980), which had been made a principal part of the oral argument on the aborted appeal:

> 1/ In its motion to dismiss, the Academy argued, inter alia, that this suit was barred by the doctrine of res judicata because of previous litigation brought by plaintiffs against the Academy in the Circuit Court of Cook County, Illinois. See Treister v. Academy of Orthopaedic Surgeons, 78 Ill.App. 3d 746, 396 N.E.2d 1225 (1st Dist. 1979), leave to appeal denied, 76 Ill.2d 630. The district court held plaintiffs' antitrust claims were not barred by res judicata because they could not have been raised in state court. The propriety of this ruling is not before this Court. However, we presume that the motion to dismiss will be renewed and reconsidered in light of the Supreme Court's recent decision in Federated Department Stores, Inc. v. Moitie, ___ U.S. ___, 49 LW 4687 (June 15, 1981).

This Court has sua sponte accepted the Court of Appeals' invitation as a directive. However it does not view Federated as calling for a different conclusion from that

previously reached on the res judicata issue--and with all respect to the Court of Appeals' suggestion, this Court does not believe its adherence to its original position is simply a matter of "coming out the same door it went in."

Part I of the Federated opinion, its statement of facts (49 U.S.L.W. at 4688-89), demonstrates graphically why that case presents the opposite side of the coin from this one, and why res judicata was properly applied there and does not apply here. We focus on Brown I and Brown II, the subject of the Supreme Court's decision. 1/

1/ Moitie I and Moitie II, had they remained before the Supreme Court, would have posed a slightly different question with one added ingredient, but with the same result. Moitie I, like the first suits by Drs. Marrese and Treister against Academy, was brought in the state court. But it was removed to the federal court, in part on the basis of federal question jurisdiction. At that point the federal court had plenary jurisdiction to hear and consider all integrally

Brown I was a federal antitrust action that "tracked almost verbatim the allegations of the Government's [Sherman Act] complaint" (49 U.S.L.W. at 4688). Once the District Court for the Northern District of California had thus acquired jurisdiction of the parties it had the power to consider not only the federal antitrust action but also any essentially identical state claims that Brown may have had against Federated and its co-defendants. That being so the District Court's dismissal of Brown's action "in its entirety" on the merits, when it became final, foreclosed all claims that Brown had asserted

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related claims Moitie had asserted or could have asserted against Federated and its co-defendants, just as was the case with Brown I, which had been initiated in the federal court at the outset. Accordingly the principles discussed in the text of this opinion would apply with full force.

or might have asserted before the federal court. As Justice Rehnquist put it for the Court in Federated, 49 U.S.L.W. at 4689:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Commissioner v. Sunnen, 333 U.S. 591, 597 (1948); Cromwell v. County of Sac, 94 U.S. 351, 352-353 (1877).

It was therefore fitting and proper for the Supreme Court to reverse the Court of Appeals, which had "conceded that the 'strict application of the doctine of res judicata' required that Brown II be dismissed" but nonetheless out of equitable considerations had sought to create an unwarranted and "unprecedented departure from accepted principles of res judicata" (id.).

But as this Court pointed out in its earlier opinion in this case, Drs. Marrese's and Treister's federal antitrust issues against Academy--which this Court is called on to adjudicate in this action --are not, as the Supreme Court put it in Federated, "issues that were or could have been raised in that action"--the state court action presented to the first forum that ruled on disputes between the parties. Had Drs. Marrese and Treister sought to insert their federal antitrust claim into their state court complaint they could not have done so, for "jurisdiction of federal antitrust suits is exclusively in the federal courts." Kurek v. Pleasure Driveway & Park District of Peoria, 583 F.2d 378, 379 (7th Cir. 1978). Therefore when the Illinois state courts dismissed Drs. Marrese's and Treister's lawsuits for

failure to state a cause of action under Illinois law:

> (1) They could not have been deciding that Drs. Marrese and Treister had failed to state a cause of action under the federal antitrust laws. Accordingly issue preclusion--collateral estoppel--does not bar the federal claim before this Court.
>
> (2) They could not be deemed to have foreclosed a claim that Drs. Marrese and Treister by definition could not have asserted before then. Accordingly the doctrine of res judicata does not bar the federal claim before this Court.

For that reason the powerful logic of Judge Learned Hand in the seminal case of Lyons v. Westinghouse Electric Corp., 222

F.2d 184, 188-89 (2d Cir. 1955), which is an integral part of the "accepted principles of res judicata" to which the Supreme Court twice referred in Federated (49 U.S. L.W. at 4689), retains its full force. Its inexorable logic and that of the other authorities (including the Restatement (Second) of the Law of Judgments) cited in this Court's earlier opinion (496 F.Supp. at 238-39) teach that res judicata does not bar the present action, and nothing in the Federated opinion teaches otherwise.

If Academy has other authority to advance in support of its position, not already submitted in its first presentation of the issues to this Court, the Court will welcome the opportunity to consider such authority. If not, it has complied with

our Court of Appeals' suggestion for reconsideration.

Milton I. Shadur
United States District
Judge

Date: August 17, 1981

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY IANNARESE, M.D., and MICHAEL R. TREISTER, M.D.,	)	
Plaintiffs,	)	No. 80 C 1405
v.	)	
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER
(October 5, 1981)

On August 13, 1981 our Court of Appeals dismissed the appeal of defendant American Academy of Orthopaedic Surgeons ("Academy") from an interlocutory order of this Court. In a footnote to its unpublished order the Court of Appeals invited reconsideration, in light of Federated Department Stores, Inc. v. Moitie, 101 S.Ct. 2424 (1981), of this Court's earlier opinion dealing with Academy's res judicata defense

(the "First Res Judicata Opinion," 496 F. Supp. 236 (N.D. Ill. 1980)). This Court promptly issued an August 17 memorandum opinion and order (the "Second Res Judicata Opinion") analyzing Federated and concluding that it required no change in the Court's original conclusion on the subject.

Academy has now moved for reconsideration of the Second Res Judicata Opinion in light of Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981) [1] and Federated. For the reasons

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1/ At the time of the First Res Judicata Opinion Judge Merhige had decided Nash at the District Court level. This Court distinguished that case on the basis of a critical difference discussed later in this opinion, declining to follow the Nash analysis in the circumstances of this case. 496 F.Supp. at 239. In the interim since the First Res Judicata Opinion the Court of Appeals for the Fourth Circuit has affirmed Judge Merhige. As discussed in this opinion, the Court of Appeals' opinion really underscores the same critical difference between the two cases.

stated in this memorandum opinion and order Academy's motion is denied.

Because this Court has dealt fully with Federated in the Second Res Judicata Opinion it will not pause for further discussion here. For the reasons already expressed there the Court simply does not agree with Academy that "Federated reinforces the approach taken in Nash"--not in the context of the present case.

Nash dealt with the effect of an earlier antitrust action, brought under the North Carolina state statute identical in all relevant respects to the federal antitrust laws, on a subsequent federal antitrust action. Plaintiffs in the two actions were both agencies of state government, held for res judicata purposes to be in privity with each other (640 F.2d at 493-97). Each sought treble damages, provided for in the

North Carolina statute as under federal law. Id. at 485. Thus the actions set the stage for consideration whether the two cases involved an "identity of causes of action"--essential for res judicata-- given the identity of facts and legal theories involved (id. at 486):

> The only differences between this action and the earlier action were (1) that this suit was based on the federal antitrust act and the earlier suit had based its legal claim on the state antitrust act and (2) the plaintiff in this later suit sought only treble damages but no injunctive relief.

As the Court put it (id. at 488):

> The two suits allege the same wrongful act, the same illegal price-fixing conspiracy, the same operative facts in support of such conspiracy. The state and federal statutes upon which the two actions are based are identical in language except in the requirement of the federal statute, but not of the state statute, of a showing of interstate commerce. In both cases, the evidence will

> be identical and the damages recoverable and the relief available the same.
>
> Under established precedent, the identity of two actions, as intimately tied together as these two, will not be destroyed in the res judicata context simply because the two suits are based on different statutes.

Here we deal not with res judicata but with claimed collateral estoppel. Plaintiffs' state court action was not an antitrust action. It claimed that denial of Academy membership followed fundamentally unfair procedures and was therefore void under common law, violated plaintiffs' due process rights (on the theory that state action was involved) and constituted a breach of contract. That action was dismissed for failure to state a cause of action under state law. Treister v. American Academy of Orthopaedic Surgeons, 78 Ill.App.3d 746, 396 N.E.2d 1225 (1st

Dist. 1979). Though it is sometimes said in oversimplistic terms (as did the Court in Nash, 440 F.2d at 490) that "collateral estoppel is generally regarded as merely a 'branch' or 'other prong' of res judicata," it must be remembered that collateral estoppel applies "to those matters which might have been decided" in the first action. That is why the exclusivity of federal jurisdiction over federal antitrust actions supports the non-preclusion of such actions, on collateral estoppel grounds, because of an earlier state court suit between the parties on totally different grounds. Kurek v. Pleasure Driveway & Park District of Peoria, 583 F.2d 370, 379 (7th Cir. 1978).

But there is something more at work here that makes the Nash analysis--even if otherwise persuasive--inapplicable. Illinois'

antitrust law makes a sharp distinction among types of anti-competitive conduct. Classic price-fixing, division of markets and exclusive dealing violations, none of which is involved in this action, carry with them treble damages just as under federal law. Ill. Rev. Stat. ch. 38, § 60-7(2), as limited to violations of §60-3(1) and (4). However conspiracies in restraint of trade (calling under federal law for application of the Rule of Reason rather than per se liability) give a state court plaintiff a right only to single damages, id. as applied to ch. 38, §60-3(2) or (3). 2/ Federal law of course makes no such distinction. Once any kind of antitrust violation is shown, treble damages

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2/ Plaintiffs' claim here is of such a conspiracy and would not give a right to treble damages under the Illinois statute.

follow as a matter of right. 15 U.S.C. §15.

Illinois law does include, for Rule of Reason type violations, a provision under which if (1) the violation is shown to be willful and (2) the trial court so exercises its discretion, up to treble damages may be awarded. That is however a very different thing--especially in a situation where as here plaintiffs are suing on an admittedly difficult violation to prove, let alone to demonstrate as "willful." 3/

Accordingly the present case brings into play the doctrine not of Nash but of such

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3/ Academy's defenses, whether or not ultimately successful, are staunchly asserted and at least substantively colorable. Academy can hardly be heard to argue that plaintiffs would have had a clear right to treble damages under Illinois law because Academy's antitrust violations were plainly willful and would have mandated the exercise of discretion to increase the award to the full limit permitted by law.

cases as Hayes v. Solomon, 597 F.2d 958, 959, 984 (5th Cir. 1979), quoted in Nash:

> The principle of res judicata which prohibits splitting a cause of action applies only to claims "then capable of recovery" in the first action (citing an authority.) In this case, the first forum, the Texas state court, could not provide the relief sought in the second forum, federal antitrust damages [i.e., treble damages]. We hold, therefore, that this case was not barred by the splitting prohibition.

Accord, Cream Top Creamery v. Dean Milk Co., 383 F.2d 358, 363 (6th Cir. 1967). Nash specifically distinguished those decisions on that very ground, given the identity between the North Carolina and the federal antitrust statutes, 640 F.2d at 490:

> In this suit, however, under the state statute, modeled as it is after the federal statute and offering the same right to recover treble damages as the federal statute, there is not the ground for denying res judicata effect to the state court judgment stated in Hayes and Cream Top. There is accordingly no sound reason under

Hayes and Cream Top for denying res judicata effect in this case to the earlier state court judgment. 4/

Where the efforts of a state court plaintiff to assert a claim totally unrelated to antitrust considerations have been rejected because the claim did not state a cause of action under state law, it would be a solecism to hold that he had "split a cause of action"--given both the differences between the state and federal antitrust laws (lack of a right to treble damages in the former) and the exclusivity of federal court jurisdiction over the latter. Nash considers that a plaintiff who "choos[es] to file the state action on

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4/ Indeed Nash, differing from Judge Learned Hand's Lyons decision though it did, found it "more persuasive" on that ground but made precisely the same distinction that this Court has made on that score. Id. at 492.

the same cause of action [has] voluntarily waived the benefit, if any, of a federal forum" (640 F.2d at 492)--and that simply does not apply here.

It is unnecessary for this Court to decide whether it would apply the doctrine of exclusivity of jurisdiction to the Nash situation and thus differ from the Nash court's result in that case. Suffice it to say that under the circumstances of this case the bar of res judicata is not required either by Federated or by Nash.

Conclusion

Reconsideration of the Second Res Judicata Order is denied. To faciliate consideration of the issue on appeal if our Court of Appeals so decides, this order is being entered immediately before the order

establishing a fine for Academy's contempt of court in failing to comply with this Court's order for production of certain documents.

Milton I. Shadur
United States District Judge

Date: October 5, 1981

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D. and MICHAEL R. TREISTER, M.D.,	)	
Plaintiffs,	)	No. 80 C 1465
vs.	)	
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

SUPPLEMENT TO
MEMORANDUM OPINION AND ORDER
(October 14, 1981)

One brief supplement to this Court's October 5, 1981 memorandum opinion and order may be appropriate, looking to the decision of our Court of Appeals in Harper Plastics, Inc. v. Amoco Chemicals Corp., No. 80-2711 (7th Cir. Aug. 24, 1981). At pages 6-7 of this Court's opinion it pointed out that plaintiffs could not have been said to "split" a cause of action where their state

court action had been filed on Illinois common law grounds then believed by them to state a cause of action, but not on antitrust grounds.

Let us arguendo entertain the opposite assumption, that plaintiffs had joined in their Illinois complaint the only antitrust claim that would assure them the full relief of treble damages and attorney's fees --a claim under the federal antitrust laws. That joinder would of course have met with immediate dismissal for want of jurisdiction, because federal courts have exclusive jurisdiction over federal court actions. And plaintiffs would then have been free to file this action, for as our Court of Appeals put it in Harper Plastics, slip op. at 4 (reversing the words "federal" and "state" to adapt the Harper Plastics facts

to those hypothesized here):

> At the outset, we consider appellant's contention that the first three counts of its amended (state) complaint were dismissed for want of subject matter jurisdiction. If that argument is correct, then res judicata cannot bar the (federal) proceedings because a dismissal for want of jurisdiction does not preclude a court of competent jurisdiction from reaching the merits of the claim in a subsequent suit. See 1B Moore's Federal Practice ¶0.405[5] at 659-62 (2d ed. 1980). That dismissal would merely preclude relitigation of the issue of whether the first tribunal had jurisdiction.

What Academy argues for application of res judicata doctrine thus extends not only to a claim that might have been made in earlier action, but a claim that might have been made had the action been brought in a different court. Harper Plastics confirms that such an extension is impermissible.

After this supplement was already prepared counsel for plaintiff Treister served a notice of motion for clarification of one

aspect of this Court's October 5 opinion. Their prolix statement may be reduced to simple terms:

(1) In its opinion the Court stated accurately that the Illinois antitrust statute gives a right only to single damages for anticompetitive actions--conspiracies in restraint of trade--described in Ill.Rev.Stat. ch. 38, §60-3(2) or (3). In passing the Court referred to such conduct parenthetically as "calling under federal law for application of the Rule of Reason rather than per se liability."

(2) Though plaintiffs argue a conspiracy in restraint of trade--a "group boycot"--they claim that such activity is illegal per se under the Sherman Act.

This Court did not of course make or intend any ruling on the rule of law that applies to plaintiffs' particular claims

under the federal statute--whether Rule of Reason or per se. That remains for the future. All that was necessary for this Court's opinion was the classification of such conduct under the Illinois statute, and the opinion dealt with that matter in clear and accurate terms. To the extent plaintiff Treister views the October 5 opinion as needing clarification this supplement should provide it. 1/

Milton I. Shadur
United States District
Judge

Date: October 14, 1981

1/ It should be noted for the record that the Supreme Court denied certiorari in Nash, 50 U.S.L.W. 3250 (Oct. 6, 1981). That of course occasions no change in this Court's October 5 opinion.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D. and MICHAEL R. TREISTER, M.D.,	)	No. 80 C 1405
Plaintiff	)	
v.	)	Honorable Paul E. Plunkett
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER
DATED: SEPTEMBER 14, 1983

Defendant, the American Academy of Orthopaedic Surgeons (the "Academy") moves this Court to certify a prior order[1] of the District Court to permit an interlocutory appeal under 28 U.S.C. §1292(b). While the facts underlying this motion are straightforward, the procedural background is not.

The Academy is a private association of orthopaedic surgeons and membership

in the association apparently confers certain professional advantages. Membership in the Academy is not, however, a prerequisite for either board certification in orthopaedic surgery or for hospital staff privileges.

Plaintiffs, R. Anthony Marrese and Michael R. Treister, are board certified orthopaedic surgeons currently practicing in Evansville, Indiana and Chicago, Illinois, respectively. Both enjoy staff privileges at several hospitals.

Plaintiffs applied for membership in the Academy. The Academy denied their applications allegedly without according them either a hearing or a sufficient statement of its reasons.

Following this rejection, plaintiffs sued the Academy in the Illinois state

courts for declaratory relief claiming that they were entitled to a hearing and a statement of the Academy's reasons for denying their application. The Illinois state courts dismissed plaintiffs' complaint for failure to state a claim. The state court held that denial of membership in the Academy does not give rise to these due process rights because it does not involve "economic necessity," of the type which exists, for example, with membership on a hospital staff. Treister v. American Academy of Orthopaedic Surgeons, 78 Ill.App.3d 746, 755-56, 396 N.E.2d 1225, 1232 (1979).

Plaintiffs subsequently filed an action in federal district court seeking injunctive relief and damages under Section 1 of the Sherman Act, 15 U.S.C. §1. In their federal action, they allege

that the Academy is a monopoly with substantial power to control the market for orthopaedic surgical services. They further allege that the Academy improperly rejected their membership applications, despite the fact that they were qualified candidates under the Academy's announced criteria.

The Academy moved to dismiss the complaint on the grounds that the plaintiffs' claim, sounding in federal anti-trust law, is barred under the doctrine of res judicata. The Academy argues that the prior state action was based on essentially the same facts as are contained in the instant complaint and that dismissal of that action by the state court for failure to state a claim on which relief can be granted bars the instant suit.

The Honorable Milton Shadur denied the Academy's motion to dismiss in Marrese v. American Academy of Orthopaedic Surgeons, 496 F.Supp. 236 (N.D. Ill. 1980). Judge Shadur reasoned that the federal anti-trust causes of action alleged by the plaintiffs in their amended complaint fall within the exclusive jurisdiction of the federal courts and are therefore not res judicata by virtue of the prior ruling in the Illinois state courts. Furthermore, according to Judge Shadur, since the Illinois state court dismissed the plaintiffs' previous lawsuit without a hearing on the merits the plaintiffs are not collaterally estopped by such a dismissal.

Following denial of the motion to dismiss, discovery commenced and the plaintiffs requested production of all

correspondence and documents relating to the Academy's action in denying their membership applications. Plaintiffs sought similar documents and correspondence concerning all other applications which had been rejected by the Academy for the preceding ten years. The Academy refused to comply with these requests.

Following this refusal, Judge Shadur issued a protective order limiting disclosure of the documents to the plaintiffs and their counsel. Judge Shadur then ordered the Academy to produce the requested materials. The Academy refused. As a result, Judge Shadur held the Academy in criminal contempt and imposed a fine of ten thousand dollars ($10,000.00). The Academy appealed the criminal contempt judgment.

On appeal, the Academy asked the Seventh Circuit to review not only the order of contempt but also the order denying its motion to dismiss the amended complaint. In an opinion dated November 4, 1982, Judge Posner, declined to review the merits of the order denying the Academy's motion to dismiss. Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083 (7th Cir. 1982). According to Judge Posner, the Court lacked jurisdiction to review the order denying dismissal because that order was interlocutory and had not been certified under 28 U.S.C. §1292(b). Judge Posner noted that Judge Shadur had entered his order denying the motion to dismiss before entering his order finding the Academy in criminal contempt. In Judge Posner's view, Judge Shadur did so to

"facilitate" consideration of the res judicata arguments as part of the appellate review of the criminal contempt judgment. Judge Posner stated that Judge Shadur was correct in taking this action "because the merit[s] of [the res judicata] argument [are] ... germane to whether the criminal contempt order was an abuse of discretion." Marrese, 692 F.2d at 1099.

After analyzing the res judicata arguments, Judge Posner concluded: "We think the balance favors preclusion where as in this case, the relevant standard of liability is the same under state and federal law and remedies are similar though not identical. The plaintiffs' alternatives to piecemeal litigation were not so paltry that the courts should have to entertain such litigation at a

at a time when both the state and federal judicial systems are staggering under caseloads of unprecedented magnitude." Marrese, supra, at 1092.

On May 11, 1983, the panel vacated its November 4, 1982 opinion and issued an unpublished second opinion, Marrese v. American Academy of Orthopaedic Surgeons, No. 81-2671 (7th Cir. May 11, 1983). In this opinion, Judge Posner stated that the panel was issuing a more narrowly focused opinion to obviate re-hearing of the appeal en banc. The res judicata argument was not discussed in the second opinion. Judge Posner did, however, specifically find that the panel lacked jurisdiction to review Judge Shadur's interlocutory order denying the motion to dismiss because it had not been certified under 28 U.S.C. §1292(b), Marrese, No. 81-2671, at p. 13.

Following the issuance of the panel's second opinion, the Seventh Circuit granted a petition for rehearing en banc. Argument is presently set for September 20, 1983. In anticipation of rehearing, the Academy has moved this Court to amend Judge Shadur's interlocutory order denying its motion to dismiss in order to certify it for immediate appeal under 28 U.S.C. §1292(b).

Plaintiffs contend that this Court lacks jurisdiction to certify the interlocutory order. According to the plaintiffs, this Court lost jurisdiction to certify the order on April 9, 1981 when the Academy filed its Notice of Appeal. On that date, plaintiffs argue, jurisdiction over the entire cause of action was transferred to the Seventh Circuit and the district court is barred

from taking any action which would affect the appeal except for actions specifically reserved to it by statute or the Federal Rules of Civil Procedure.

This Court finds the plaintiffs' argument without merit. The instant action is still pending before this Court. The only matter on appeal is the judgment against the defendant for criminal contempt, a judgment which is an ancillary proceeding in the entire litigation. The District Court retains jurisdiction over the parties and its earlier order denying the defendant's motion to dismiss. Thus, this Court is free to amend Judge Shadur's order denying the Academy's motion to dismiss in order to permit review of that order under 28 U.S.C. §1292(b). Indeed, Judge Posner, in both his opinions, found that

the Seventh Circuit lacked jurisdiction to consider the District Court's order denying the Academy's motion to dismiss, 81-2671, supra, p. 3; 692 F.2d 1068 at 1096. Jurisdiction over the order denying the motion to dismiss must remain with this Court. Therefore, this Court is convinced not only that it has the power to amend its prior order denying the Academy's motion to dismiss but also has a clear obligation to do so. The contempt judgment presently on appeal was entered because of the Academy's wilful refusal to comply with a discovery order. In turn, the Academy's refusal was based on its disagreement with the earlier denial of its motion to dismiss. Thus, it is clear that the criminal contempt is inextricably joined with the res

judicata question. Because the Seventh Circuit must consider the propriety of the criminal contempt order it should be free to review the prior order which apparently underlies the Academy's contempt.

Rule 5(a) of the Rules of Appellate Procedure, 28 U.S.C. §5 provides:

> "An order may be amended to include the prescribed statement [of 28 U.S.C. §1292(b)] at any time...."

In construing this language, courts have held that an order may be amended to include a certification statement. Aparicio v. Swan Lake, 643 F.2d 1109, 1113-14 (5th Cir. 1981); Houston Fear-Less Corp. v. Teter, 313 F.2d 91 (10th Cir. 1962); Hadjipateris v. Pacifica, S.A., 290 F.2d 697 (5th Cir. 1961); Sperry Rand Corp. v. Bell Telephone Laboratories, 272 F.2d 29 (2d Cir. 1959);

see Notes of Advisory Committee on Appellate Rules, Rule 5(a); 9 Moore's Federal Practice 77 205.03[2]. Aparicio involved a situation in which the trial court reentered its own previously certified order after determining upon reconsideration that the order still met the criteria for certification under 28 U.S.C. §1292(b). After reviewing this action, the Fifth Circuit Court of Appeals concluded that the trial court was empowered to reenter its certified order for the sole purpose of reviving the right to petition for appeal within ten days under Rule 5a, see Braden v. University of Pittsburgh, 552 F.2d 948, 952 (3d Cir. 1977) (adopted the same position in dictum); see also, In re LaProvidencia Development Corp., 515 F.2d 94 (1st Cir. 1975).

Upon reconsideration of the October 5, 1981 order denying the Academy's motion to dismiss, this Court finds that the order met and continues to meet the two certification criterion set forth in 28 U.S.C. §1292b. First, the order must involve a controlling question of law as to which substantial grounds for differences of opinion exist. The differing opinions of Judge Shadur of the district court and Judge Posner's first opinion clearly demonstrate that the first criterion is met. Should the Seventh Circuit determine that Judge Shadur's decision in denying the motion to dismiss was in error, that determination would terminate the litigation. Thus the question of law is controlling. Mills v. Electric Autolite Co., 403 F.2d 429 (7th Cir. 1968), rev'd 396 U.S. 375

(1970).

Accordingly, for the reasons stated above, the order of October 5, 1981 denying the Academy's motion to dismiss is amended to include the following statement:

> The issue of whether the prior state court suits by these plaintiffs against the Academy bar this action by principles of res judicata or collateral estoppel is a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from this order may materially advance the ultimate termination of the litigation if the Court of Appeals, in its discretion, permits review of the order denying the Academy's motion at this time.

ENTER:

Honorable Paul E. Plunkett, District Court Judge

Dated: September 14, 1983

Footnote

1/ The order which the Academy seeks to have amended is the Order & Memorandum of October 5, 1981, Marrese v. American Academy of Orthopaedic Surgeons, 524 F.Supp. 389 (N.D. Ill. 1981). This order granted the Academy's motion to reconsider an earlier order denying its motion to dismiss at 496 F.Supp. 236 (N.D. Ill. 1980). Upon reconsideration, Judge Shadur affirmed his earlier order denying the motion to dismiss on the basis of res judicata. For convenience, this Court will refer to the opinion and order upon reconsideration as the interlocutory order denying the Academy's motion to dismiss.

APPENDIX J

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 16, 1983.

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Petitioner,	)	
v.	)	Petition for
MISC. NO. 83-8046	)	Permission to
	)	Appeal
R. ANTHONY MARRESE, M.D. and MICHAEL R. TREISTER,	)	
Respondents.	)	

This matter comes before the court for its consideration on the following documents:

1. The "PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. §1292 (b)" filed herein on September 13, 1983 by

counsel for the petitioner.

2. "DR. TREISTER'S OBJECTION TO ACADEMY'S PETITION FOR PERMISSION TO TAKE INTERLOCUTORY APPEAL, AND REQUEST FOR SEPARATE BRIEFING OF CERTIFIED ISSUES IN THE EVENT THAT SAID PETITION IS GRANTED" filed herein on September 15, 1983.

3. "R. ANTHONY MARRESE'S PRELIMINARY RESPONSE TO PETITION FOR PERMISSION TO APPEAL THE RES JUDICATA ISSUE" filed herein on September 15, 1983.

On consideration thereof,

IT IS ORDERED that the "PETITION FOR PERMISSION TO APPEAL PURSUANT TO U.S.C. §1292(b)" is hereby GRANTED. For the purpose of judicial economy, the issue certified for appeal will be resolved during the en banc argument currently set for September 20, 1983. The parties, if they desire, may file supplemental briefs

addressing the merits underlying the issue certified for appeal. These supplemental briefs must be filed in this Court on or before 3:00 p.m. on September 19, 1983.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D., et al.	)	
Plaintiffs,	)	
v.	)	No. 80 C 1405
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER
(Date: March 5, 1981)

Plaintiffs R. Anthony Marrese and Michael R. Treister (respectively "Dr. Marrese" and "Dr. Treister") have moved to compel defendant American Academy of Orthopaedic Surgeons ("Academy") to produce certain documents identified in their First and Second Requests for Production. In turn Academy has moved to limit the scope of discovery to the sole issue of whether plaintiffs have suffered

injury from Academy's allegedly unlawful actions. Some 89 pages of briefs and 107 pages of exhibits later, plaintiffs' motion to compel production of documents is granted and Academy's motion to limit the scope of discovery is denied.

Drs. Marrese and Treister are Board-certified practicing orthopaedic surgeons. They complain of allegedly having been arbitrarily excluded, by procedures amounting in legal effect to a group boycott, from membership in Academy.

They seek production from Academy of "all documents and other things contained in [its] admissions files" and correspondence files or otherwise in its possession concerning Drs. Marrese, Treister and Federic T. Huffnagle

("Dr. Huffnagle") 1/ and all documents in its admissions files concerning persons other than Drs. Huffnagle, Marrese and Treister "whose membership applications have been rejected at any time during the past ten years." Academy contends that motion should be denied because granting it would:

1. allow Drs. Marrese and Treister to breach their contracts with Academy;

2. deprive Academy of full judicial consideration of its counterclaim; 2/

1/ Dr. Huffnagle allegedly informed plaintiffs' attorney that he had been excluded from membership in Academy for "anticompetitive" reasons. Corrected Amended Complaint ("Complaint") ¶52.

2/ Academy's counterclaim is based on its allegation that Drs. Marrese and Treister are contractually bound not to reveal publicly or attempt to make public information assembled by Academy in its admissions process. Accordingly objections 1 and 2 may be considered together.

3. contravene the public interest in preserving the confidentiality of Academy's admissions files; and

4. violate the First Amendment right of Academy members to freedom of association. 3/

3/ Academy's tactics with respect to its objections (though this comment applies with greater force to the first two than to the last two) are distressing. Much of its effort to limit discovery is effectively based on its contention that it will ultimately prevail on the merits. Fed. R. Civ. P. ("Rule") 26(b) plainly makes that factor irrelevant to the propriety of a discovery request. Indeed the very basis for discovery -- facilitating a full "flushing out" of the facts that will make possible an informed evaluation of the merits -- is ignored by Academy.

Academy's Principal Arguments -- Rules 26(b)(1) and 26 (c)

As with every motion dealing with discovery matters, our starting point is the language of Rule 26(b)(1)(emphasis added):

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

This Court has consistently described that standard as establishing a very low threshold indeed.

Except as hereafter discussed under "Pre-1975 Materials," Academy has not objected to the discovery requests on relevancy grounds. To prevail in its opposition it would thus ordinarily have to assert a cognizable "privilege." Objections 1, 2 and 3 plainly fail to meet that requirement. However Academy

argues that those objections to discovery are sustainable under Rule 26(c):

> Upon motion by a party...and for good cause shown, the court...may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including...that discovery not be had...

Academy's first and second objections are as untenable under Rule 26(c) as under Rule 26(b)(1). Academy has utterly failed to demonstrate how discovery would result in "annoyance, embarrassment, oppression, or undue burden or expense" because it would facilitate the alleged breach of contract by Doctors Marrese and Treister. Such claimed breach (if any) is fully redressable at trial.

Academy also contends that its third objection to discovery, based on the alleged public policy favoring preserv-

ation of the confidentiality of Academy's admissions files, is sufficient to defeat plaintiffs' motion to compel under Rule 26(c). See, e.g., Marrese v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir. 1977). Even if such a "public policy" existed in other contexts, it must be overborne here by the congressionally created public policy exemplified by the federal anti-trust laws. Just disposition of plaintiffs' claims under those laws (which claims must be assumed to be valid at this stage of the litigation) would be rendered impossible should they be denied access to the requested information. Proof of the claimed group boycott would require demonstration of the real reasons for Academy's denial of admission to candidates, information obtainable solely through the materials Academy seeks to

protect.

Moreover, even on the strength of its own authorities Academy must fail. Its reliance on Keyes is unpersuasive. There a female faculty member had filed a sex discrimination suit against her College on her own behalf and for a class of female faculty members. On appeal it was held that the District Judge had not abused his discretion by refusing to compel the College to produce confidential annual evaluations of faculty members. Importantly, the College had already been required to provide broad discovery other than those evaluations, so that plaintiff had been enabled to prepare her case. Even more significant, the Court of Appeals based its decision on the fact that the College had made no attempt "to justify any male-female disparity on the basis

of these evaluations" (552 F.2d at 581). In contrast, Drs. Marrese and Treister would be effectively foreclosed from pursuing this action absent access to Academy's files. Academy itself acknowledges that the evaluations contained in those files largely account for the action it has taken on membership applications. Thus even reading Keyes most favorably to Academy, it offers no support for Academy's expansive "public policy" theory.

Academy's final contention is that production of the requested documents would infringe the First Amendment right of Academy members to freedom of association. Academy argues that if confidential candidate evaluations by its members are made public, the ability of those members "to freely choose their colleagues" and

candidly conduct internal proceedings would be unconstitutionally impaired.

That theory is also simply untenable. Academy made the same argument in its motion to dismiss the complaint, and the Court gave it short shrift indeed (496 F.Supp. at 241). It fares no better on repetition.

Even if this Court were to assume that Academy possesses a strong First Amendment interest in the confidentiality of its application process, the Court cannot accept Academy's contention that by invoking that interest a party may be effectively immunized from attack for antitrust violations. Plaintiffs allege that exercise of the very "associational rights" asserted by Academy constitutes an illegal group boycott. Our Supreme Court has carefully outlined the limited

areas in which "associational" activity is immunized from antitrust prosecution. Eastern Railroad Presidents Conference v. Noerr, 365 U.S. 127 (1961); UMW v. Pennington, 381 U.S. 657 (1969). Academy's actions plainly fall outside the category of protected activities established by the Noerr-Pennington doctrine.

Academy's citation of landmark Supreme Court cases 4/ misses the mark entirely. Discovery of the requested materials (and more specifically the ultimate relief requested in this action) would not impermissibly impair the association of

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4/ National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958); Bates v. Little Rock, 361 U.S. 516 (1960); Brotherhood of Trainmen v. Virginia, 377 U.S. 1 (1964); Griswold v. Connecticut, 381 U.S. 479 (1965).

present Academy members, discourage future membership nor preclude the Academy from lawfully regulating its membership. 5/ Drs. Marrese and Treister seek relief for unlawful exclusion from association, an issue not remotely analogous to the issues raised in the cases Academy cites.

This is not to say of course that Academy's legitimate interest in the confidentiality of its records (that is, in screening them from public view) is insubstantial. For that reason the Court has, in ruling on other disclosure matters in this case, expressed its willingness

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5/ To the extent Academy's arguments of associational rights do have force, they prove too much. They would prevent discovery of every conspiracy in restraint of trade on the theory that the conspirators' "freedom of association" was being infringed.

to enter a protective order limiting access to the requested materials to Drs. Marrese and Treister and their attorneys. It will do so here as well.

Pre-1975 Materials

Academy has agreed to comply with discovery requests for information as to its "Automatic Document Destruction Policy" and general admissions requirements, but only for the period beginning in 1975. It asserts that all prior materials are irrelevant because the statute of limitations bars relief for any pre-1975 antitrust violations. Presumably its objection to producing such prior materials would also apply to the items previously discussed in this opinion.

In response Drs. Marrese and Treister argue that pre-1975 materials may shed light on Academy's present practices.

They seek to establish that Academy has engaged in "a nationwide conspiracy in restraint of trade" and argue that discovery of pre-1975 materials may be critical to demonstrating the existence of a conspiracy and the relevant history of Academy admissions practices. See, J. von Kalinowski, 16 M Business Organizations: Antitrust Laws and Trade Regulation §106.04[1], at 106-56. See also, United States v. International Ass'n of Bridge, Structural and Ornamental Iron Workers Local No. 1, 438 F.2d 679, 683 (7th Cir. 1971).

Academy has submitted nothing whatever in response to that familiar and well-established proposition, which finds its counterparts in many areas of the law (most often in the context of deciding the admissibility of evidence). This

Academy objection, which is really the only one predicated on notions of relevancy, is rejected as well.

Academy's Motion to Limit Discovery

Because Academy's motion to limit discovery is nothing more than a (lengthy) restatement of its arguments on plaintiffs' motion to compel discovery, it need not be addressed independently. For the reasons already stated, plaintiffs are entitled to engage in the requested discovery and Academy's motion is therefore denied.

Conclusion

As already indicated, the motion of Drs. Marrese and Treister to compel the production of documents is granted in its entirety, and Academy's cross-motion to limit production is denied in full. Academy is directed to comply fully with

the First and Second Requests for production on or before a date to be fixed at this Court's March 5, 1981 status hearing. If the parties are unable to reach agreement on the terms of an "eyes only" protective order consistent with this opinion or or before March 13, 1981, either party may on notice to the other submit a proposed form of such order.

Rule 37(a)(4) provides that upon the granting or denial of discovery motions "the court shall, after opportunity for hearing, require the [loser] to pay to the [winner] the reasonable expenses incurred in obtaining the order [or opposing the motion], unless the court finds that the opposition to the motion [or the making of the motion] was substantially justified or that other circumstances make an award of expenses unjust." In

implementation of that mandate the Court directs Drs. Marrese and Treister to submit an application for such expenses on or before March 16, 1981, and Academy is ordered to file a responsive memorandum dealing with both the propriety of awarding and the amount of such requested expenses on or before March 26, 1981.

There is little case law treating with the "hearing" procedure under Rule 37(a)(4), but it has been this Court's practice to consider the written submissions provided for in the preceding paragraph as constituting the required hearing unless either party moves for an evidentiary hearing. See Persson v. Faestel Investments, Inc., 79 C 3977 (Dec. 29, 1980). Accordingly the parties are requested to include in their respective submissions a statement as to

whether an evidentiary hearing beyond the written submissions is in fact requested and, if so, why one is required.

Milton I. Shadur
United States District Judge

Date: March 5, 1981

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 80 C 1405
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER
(Date: April 7, 1981)

Last month (in the "March 5, 1981 Opinion") this Court granted the motion of plaintiffs R. Anthony Marrese, M.D. and Michael R. Treister, M.D. to compel defendant American Academy of Orthopaedic Surgeons ("Academy") to produce certain documents (the "Documents") identified in their First and Second Requests for

Production. 1/ Those Documents comprised "all documents and other things" contained in Academy's admissions and correspondence files concerning Drs. Marrese, Treister and Federic T. Huffnagle ("Dr. Huffnagle") and all documents in its admissions files concerning persons other than Drs. Marrese, Treister and Huffnagle "whose membership applications have been rejected at any time during the past ten years."

In view of (1) the probably sensitive nature of some materials to be produced and (2) Academy's various confidentiality claims, the Court invited the parties to

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1/ Drs. Marrese and Treister are Board-certified practicing orthopaedic surgeons. They complain of having been arbitrarily excluded, by procedures amounting in legal effect to a group boycott, from membership in the Academy.

submit proposals for a protective order to apply to plaintiffs' use of the Documents. Having reviewed those submissions the Court today enters a protective order (the "Order") in the form attached as Exhibit A, which draws on each party's submission but parallels neither.

In a related motion, Academy has sought a preliminary injunction to prevent plaintiffs from receiving custody of the documents. To that end Academy relies on two arguments it originally made in its counterclaim:

1. Drs. Marrese and Treister contracted with Academy not to seek "publication nor public dissemination" of the Documents. By moving for discovery of the Documents in this action they are breaching that contract.

2. Compelled disclosure of the

Documents would directly infringe upon "the constitutionally protected right [of Fellows of the Academy] to select those persons with whom they will associate" in that the Fellows could not thereafter "communicate or expect to communicate in complete candor regarding their individual views about the professional reputation or character of individual applicants, including their individual views of the professional and ethical standards and performance of applicants for Fellowship."

For the reasons stated in this memorandum opinion and order Academy's motion for a preliminary injunction is denied.

Academy's Motion for a Preliminary Injunction

Our Court of Appeals last year stated the standards that must be satisfied for a preliminary injunction to issue, In re Uranium Antitrust Litigation, 617 F.2d

1248, 1260-61 (7th Cir. 1980):

1. The plaintiffs [here the counter-plaintiff Academy] have no adequate remedy at law and will be irreparably harmed if the injunction does not issue;

2. The threatened injury to the plaintiffs outweighs the threatened harm the injunction may inflict on the defendant;

3. The plaintiffs have at least a reasonable likelihood of success on the merits; and

4. The granting of the preliminary injunction will not disserve the public interest.

Those criteria will be reviewed in turn.

1. Adequate Remedy at Law and Irreparable Harm

Academy asserts that any compelled disclosure of the Documents will injure it irreparably "in that the Academy will

no longer be able to examine and validate the high personal and professional standards of applicants for Fellowship." Stated differently, Academy claims that:

(1) Its members rely on strict confidentiality of the application process in submitting evaluations of applicants.

(2) Disclosure required by the March 5, 1981 Opinion, by undermining the confidentiality of that process, would have a "chilling effect" on the future exercise of candid and free scrutiny of candidates by Academy members.

Academy's concern cannot be wholly ignored. However the claimed "chilling effect" stemming from disclosure is greatly overstated by Academy, in light of the restrictions on such disclosure imposed by the Order. Specifically it allows plaintiffs access to the Documents

only under the following conditions:

(1) Documents are to be kept in the possession of plaintiffs' counsel, to be used by them, their employees and plaintiffs solely for the purpose of preparing for and litigating this action.

(2) Drs. Marrese and Treister themselves are given access to Documents other than those contained in their own files. They are not to be provided by their counsel with the actual contents and origin of those Documents. Discussion of those Documents by counsel with Drs. Marrese and Treister is limited to their "general contents."

(3) No disclosure of any information to counsel in any other lawsuits or to persons other than those designated in paragraph 1 (except for disclosing a document to its author) is permitted

without leave of Court.

(5) "Every document submitted to the Court constituting, or containing information developed from, any Document" must be collected at the end of the litigation and returned to Academy's counsel except to the extent, if any, otherwise ordered by the Court.

(6) All items described in paragraph 5 submitted to the Court shall be submitted under seal to be opened only upon order of the Court.

Under those restrictive conditions the confidentiality of Academy's admissions process is largely preserved. 2/ Review

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2/ It is of course true that to the extent that any documents may reveal illegal actions they are subject to wider dissemination by the introduction of such documents as evidence at trial. This Court does not view Academy's interest in confidentiality as properly encompassing any relevations that may result from such disclosure.

of the Documents is narrowly confined to the necessities of this litigation. Except for materials in their own files, Drs. Marrese and Treister are effectively insulated from access to the content and origin of specific Documents. Any knowledge of Documents acquired by them, their counsel or others in the context of the ordered disclosure may not be disseminated further. In short any impact on the confidentiality of Academy's process evaluating candidates, although not wholly non-existent, is far less extensive than Academy contends.

2. Balancing of Hardships

Academy's claimed injury or hardship from denial of its injunction motion must be balanced against the harm that an injunction would inflict on Drs. Marrese and Treister. As already noted, the

magnitude of the former is substantially overstated by Academy.

In contrast, the "threatened harm the injunction may inflict" on Drs. Marrese and Treister weighs far more heavily in the scales of equity. Without access to the Documents Drs. Marrese and Treister are effectively prevented from continuing this litigation. As this Court stated in its March 5, 1981 Opinion:

> Just disposition of plaintiffs' claims...would be rendered impossible should they be denied access to the requested information. Proof of the claimed group boycott would require demonstration of the real reasons for Academy's denial of admission to candidates, information obtainable solely through the materials Academy seeks to protect.

Academy argues that Drs. Marrese and Treister should be required to demonstrate "fact of injury," a prerequisite to relief under the antitrust laws, before

engaging in discovery of the Documents. It reasons that should they fail to prove injury, the harm to Academy of disclosure would be avoided and Drs. Marrese and Treister would suffer no prejudice as a result of non-disclosure.

Nothing in the Federal Rules of Civil Procedure or the case law requires the imposition of such a bifurcation on plaintiffs.3/ Given the other factors discussed in this opinion, this Court will not in its discretion force Drs. Marrese

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3/ Academy relies on the Affidavit of Charles V. Heck in arguing that Drs. Marrese and Treister will be unable to demonstrate "injury" as a result of Academy's actions. Though plaintiffs will be put to their proof on the issue, it cannot be foreclosed at this stage of the litigation (it may be observed that Academy has not sought summary judgment based on the affidavit). In any case the affidavit offers no basis for limiting discovery in the manner Academy urges.

and Treister to undergo such piecemeal discovery.

3. Likelihood of Success on the Merits

This Court has commented at some length, both in the Opinions and in open court, on the non-viability of each of Academy's substantive claims (breach of contract and First Amendment infringement). Accordingly in the context of the present motion the Court's views need not be restated at length:

(1) Academy's breach of contract claim rests on language in its application form 4/ that Drs. Marrese and Treister

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4/ Academy's By-laws contain a restriction (Article VIII, Section 1) parallel to the portion of the application form indicated by ellipsis in the text quotation:

> The entire contents of any application for Fellowship...shall be privileged and confidential and shall not be subject to publication nor public dissemination whether voluntary, involuntary or by operation of law.

are allegedly breaching:

> The undersigned agrees that he will comply with each and every provision of the By-Laws...The undersigned further agrees that he will not cause or attempt to cause any public disclosure of the contents of any application of any applicant for Fellowship or Membership in the Academy, of whatever classification, or any proceedings of any Admissions Committee pursuant thereto, whether said public disclosure be by operation of law or otherwise.

As the Court has previously observed, Academy's reliance on this provision is facially unpersuasive. Although the Order subjects Academy to limited "disclosure" of its application files in this action, that simply and obviously does not constitute public disclosure of the Documents. And it is only public disclosure, by the express terms of the application form, that is prohibited.

For obvious reasons Academy does not refer to the application language in its argument. Instead it seeks to rely on its By-laws provision quoted in footnote 4, which speaks of "publication or public dissemination." Such reliance is also misplaced. "Publication or public dissemination" of the Documents, in the normal sense of those terms, is plainly not required (and in fact is prohibited) by the Order. In oral argument Academy has sought to distinguish this unambiguous language of the By-laws by arguing that "publication" should be construed as that term is used in the defamation context -- meaning dissemination to a single person -- but that ingenious reading is disingenuous. Though it scarcely merits a response, it does violence to the natural

meaning of the phrase. 5/ Again, however, Academy's argument is flately belied by the plain language of the application form.

(2) As for Academy's First Amend-

5/ "Publication" in the technical defamation sense would encompass any dissemination, whether private or public, thus rendering the other term in the phrase ("public dissemination") totally superfluous. Both the fair reading and the correct one are to regard the two terms as a typical lawyers' pairing of synonyms, using two where one would suffice ("null and void").

ment argument, this Court has said in the March 5 Opinion:

> Even if this Court were to assume that Academy possesses a strong First Amendment interest in the confidentiality of its application process, the Court cannot accept Academy's contention that by invoking that interest a party may be effectively immunized from attack for antitrust violations. Plaintiffs allege that exercise of the very "associational rights" asserted by Academy constitutes an illegal group boycott. Our Supreme Court has carefully outlined the limited areas in which "associational" activity is immunized from antitrust prosecution...Academy's actions plainly fall outside the category of protected activities established by the Noerr-Pennington doctrine.

Academy advances nothing to justify a different conclusion.

Academy's "likelihood of success on the merits" must be measured by the substantive claims of its counter-claim, not (as Academy would have it) the "fact of

injury" proposition advanced by the Heck affidavit. And those substantive claims are really untenable. In injunction vocabulary, Academy's "likelihood of success on the merits" is less than reasonable.

4. The Public Interest

This Court has also previously commented on Academy's public policy arguments regarding disclosure of the Documents. Those comments are equally applicable to Academy's motion:

> Academy also contends that its third objection to discovery, based on the alleged public policy favoring preservation of the confidentiality of Academy's admissions files, is sufficient to defeat plaintiffs' motion to compel...Even if such a "public policy" existed in other contexts, it must be overborne here by the congressionally created public policy [of the antitrust laws].

Accordingly Academy's motion for a preliminary injunction must be denied. Although Academy has shown that disclosure of the Documents might have some adverse effect on strict confidentiality of its application process, the magnitude of that effect is greatly exaggerated in Academy's submissions to the Court. In legal terms any harm to Academy is not "irreparable." Hardships imposed on Drs. Marrese and Treister by granting Academy's motion would substantially outweigh the hardship on Academy should the Court reach an opposite result. Academy has failed to demonstrate that its substantive claims have a reasonable chance ultimately to prevail. Finally, Academy is unable to invoke any public policy favoring its position that is not substantially overborne by a public policy

favoring disclosure in this context.

Academy's Motion for a Stay Pending Appeal

In the alternative Academy requests that the Court enter an order staying compliance with the March 5, 1981 Opinion "pending appellate review of the denial of this Motion." "When an application for a stay of a district court order is made, the criteria to be employed in deciding whether it should be granted are much the same as would be employed on application to the district court for a preliminary injunction." Collin v. O'Malley, 452 F.Supp. 577, 579 (N.D. Ill. 1978). For the reasons already stated and because this Court perceives no other circumstances justifying a stay, Academy's motion is denied.

Conclusion

Academy's motion for a preliminary injunction or alternatively for an order

staying complaince with this Court's March 5, 1981 Opinion pending appellate review of the denial of Academy's motion is denied. Academy is directed to comply with the March 5, 1981 Opinion immediately. In reviewing the Documents, Drs. Marrese and Treister and their counsel are immediately subject to the restrictions contained in the protective order.

Milton I. Shadur
United States District Judge

Date: April 7, 1981

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 80 C 1405
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

PROTECTIVE ORDER
DATED APRIL 7, 1981

The Court having heard plaintiffs' Motion to Compel Production of Documents and defendant's Motion to Limit Discovery, and it having been ordered that the documents requested must be produced, it is hereby ordered that all documents responsive to the plaintiffs' First and Second Requests for Production that are the subject of the Court's order of March 5, 1981 (the "Documents") shall be produced and that the following conditions

shall apply with respect to such production:

1. All the Documents contained in defendant's admissions files and correspondence files or otherwise in its possession concerning R. Anthony Marrese, M.D. and all the Documents in the defendant's admission files concerning each other person who applied to be but was not elected a Fellow of defendant in any of the years 1970 through 1980 shall be kept in the possession of the attorneys of record in this action and may be used only by plaintiffs' counsel, their employees and consultants and plaintiffs themselves, solely for the purposes of preparing for and litigating this action.

2. Without leave of Court, plaintiffs' counsel shall not communicate

to plaintiffs the substance of any information derived from the Documents referring to applicants other than Drs. Marrese and Treister, except in accordance with the following sentence. Counsel shall have the right to discuss with plaintiffs the general contents of such Documents in order properly to prepare for and prosecute this action, but shall not in the course of such discussions identify the source of such Documents or identify the actual contents of the files relating to said applicants. Any depositions taken of such applicants other than Drs. Marrese and Treister shall be transcribed under seal and shall not be made available for further publication without further order of Court.

3. Any Document may be shown by

plaintiffs' counsel to the third party who appears to be the author of the Document and to the attorney for any such person, in each case if done in furtherance of the purposes referred to in Paragraph 1.

4. Without leave of Court, none of the persons referred to in Paragraph 1 as entitled to use the Documents shall communicate the substance of any information derived from the Documents to any other attorney in any other law-suit or to any other person, either by disclosing the Documents or in any other manner, except as otherwise permitted in this Order.

5. At the time that plaintiffs' counsel learn that any person has first become subject to the restrictions of this Order by receipt of a Document or

of a communication of the substance of any information derived therefrom, plaintiffs' counsel shall deliver to such person a copy of this Order and shall inform such person that he or she is bound by its provisions and may be subject to contempt proceedings for any violation he or she may commit.

6. Plaintiffs' counsel shall maintain (a) the Documents and information contained therein in a separate file and (b) a record of every copy made of the Documents and of such information, and all such copies shall be accounted for to defendant's counsel at the conclusion of this action. Within 15 days of the final disposition of this action, all such copies shall be returned to defendant's counsel, with an accounting for all such copies, except to the

extent if any otherwise ordered by this Court.

7. Every document submitted to the Court constituting, or containing information developed from, any Document shall be filed under seal in the Court's chambers, to be opened only upon order of this Court. All documents filed under seal shall be submitted in an envelope containing the case caption and inscribed as follows:

NOTICE OF CONFIDENTIALITY

The enclosed document contains confidential information that is covered by a protective Order entered by the Court. It is filed under seal with the Court, and this envelope may only be opened pursuant to order of Court. Violation of the Court's protective Order may result in contempt proceedings.

8. Any other Documents may become subject to the restrictive provisions of this Order at the election of any party

if marked "CONFIDENTIAL." Such procedure shall be without prejudice to the rights of any other party to object to such designation or the consequences thereof as provided in Paragraph 9.

9. All procedures and limitations set forth in this Order shall be binding upon the parties, their counsel and each person to whom disclosure is made by the plaintiffs or their counsel. Its terms and limitations may not be modified or deviated from except upon written stipulation by all parties, or by application to the Court, upon notice and by motion, seeking such modification or approval of such deviation by the Court.

Dated:
April 7, 1981

Milton I. Shadur
United States District Judge

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D.) AND MICHAEL R. TREISTER, M.D.,	)	
Plaintiffs,	)	
v.	)	No. 80 C 1405
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendants.	)	

ORDER DATED OCTOBER 5, 1981

Upon the dismissal by our Court of Appeals of the appeal by the American Academy of Orthopaedic Surgeons ("Academy") plaintiffs have renewed their motion for production of the documents that had been the subject of that appeal. Counsel for Academy have confirmed that the documents are in their possession but that they and Academy have agreed that the documents will not be produced, that they waive issuance of a rule to show cause as to

why Academy should not be held in contempt for such non-production and that a criminal contempt citation should in fact issue against Academy to permit appeal.

This Court has considered what penalty should be imposed for such criminal contempt. It views the motion of plaintiffs' counsel for a $5,000 per day fine as wholly inappropriate both because of its magnitude and because it would penalize Academy for the period that the Court of Appeals would require to consider the issues on appeal. On the other hand Academy's counsel's suggestion of a token $500 fine is equally inappropriate given this Court's strongly-held view that the grounds for non-production are totally non-meritorious--indeed, as this Court's opinion on the

subject put it, untenable.

Taking into account the speciousness (or less than speciousness) of Academy's claims, the fact that in light of its financial standing its right to appeal will not be chilled by a substantial fine and other relevant factors, the Court hereby adjudicates Academy to be in contempt for such non-production and fines Academy the sum of $10,000. This order is without prejudice to such further orders as may be entered by reason of Academy's non-production (judgment having been reserved, pending ultimate resolution of the merits of such non-production, on plaintiffs' motion for an award of expenses under Fed. R. Civ. P. 37).

Dated:
October 5, 1981

Milton I. Shadur
United States District Judge

APPENDIX O

Opinion by Judge Posner
Judge Bauer concurring; Judge Eschbach concurring in part, dissenting in part; Judge Flaum concurring in part, dissenting in part; Judge Wood, joined by Judges Cummings and Cudahy, dissenting; Judge Cudahy, joined by Judges Cummings and Wood, dissenting.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 3, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSEE E. ESCHBACH, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

Nos. 81-2671, 83-2683

R. ANTHONY MARRESE and MICHAEL R. TREISTER,	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division No. 80 C 1405 Milton I. Shadur, Judge
Plaintiffs-Appellees,	)	
v.	)	
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant-Appellant.	)	

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that in No. 81-2671 the contempt judgment is REVERSED, with directions; and in No. 83-2683 the order denying the defendant's motion to dismiss the underlying suit is REVERSED, with directions, in accordance with the opinion of this Court filed this date. Costs on appeal are awarded to the Academy.

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D., and MICHAEL R. TREISTER, M.D.,	)	
Plaintiffs,	)	
vs.	)	No. 80 C 1405
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

MOTION FOR TEMPORARY
LIMITATION ON THE SCOPE OF DISCOVERY
(Filed: February 5, 1981)

The American Academy of Orthopaedic Surgeons, by its attorneys, moves the Court for an order to limit temporarily the scope of discovery to the issue of "fact of injury" and set that issue for evidentary hearing on a date certain. In support of this motion, the Academy states as follows:

1. The Academy is a voluntary, professional association of board certified orthopaedic surgeons each of whom is elected to membership. The members ("fellows") of the Academy exercise their right of association in considering and commenting upon each physician who seeks to be elected to fellowship by the Board of Directors of the Academy. Such right to consider and comment upon physician applicants for fellowship wishing to associate with the existing fellows is the exercise of freedom of association protected by the First Amendment to the U.S. Constitution.

2. Whereas freedom of association concepts cannot serve as a protective mantle for anticompetitive conduct, the mere avermant of factual assertions in a complaint does not, <u>without more</u>,

justify abrogation of other constitutionally protected rights. Participation in litigation as a plaintiff is, in fact, no more than an exercise of First Amendment rights which cannot, alone, justify encroachment on and a chilling of the exercise of equally protected rights by others.

3. The plaintiffs have asserted that they are injured in their business or property by reason of the Academy's failure to elect them to fellowship. It is claimed that the fact of membership in the Academy is one of several considerations taken into account in different and professional circumstances, with the result that their failure to be elected to membership has inflicted an injury compensable under the antitrust laws.

4. The Academy has claimed that as a voluntary, professional society (to which fellows are elected after several years in private practice following completion of board certification), fellowship - or lack of fellowship - has no economic significance to the plaintiffs, or other practicing orthopaedic surgeons, and that all educational and other professional opportunities afforded by the Academy are available to any orthopaedic surgeon without regard to whether he or she is a fellow.

5. The Academy also claims that each of the plaintiffs expressly agreed that as a preliminary condition for considering the application of each plaintiff, and initiating an inquiry of the Academy's fellows for their comments about the plaintiffs, that the plaintiffs would respect as confidential any such inquiries undertaken in connection with their application. The Academy represents to its fellows that their comments on physician applicants will be treated confidentially in order that truthful, candid observations will be made about those practicing physicians seeking to associate with Academy fellows.

6. Without a prior determination of the factual basis for the plaintiffs' claims concerning the economic significance of Academy membership, they seek to discover initially the confidential communications of Academy fellows made in the exercise of the fellows' right to comment on and thereby select those persons with whom they wish to associate.

7. The rights of Academy fellows can and should be preserved and protected

consistent with the U.S. Constitution by requiring the plaintiffs to establish first the necessary factual predicate from which would spring the right to invade and inquire into the exercise of the right of association by the Academy's fellows.

WHEREFORE, the American Academy of Orthopaedic Surgeons respectfully prays the Court to enter an order limiting discovery to the issue of the existence of "fact of injury" wherein denial of Academy fellowship is first shown to constitute an injury to the business or property of the plaintiffs prior to further discovery effort involving and

infringing upon the exercise of First Amendment rights by the Academy's fellows.

THE AMERICAN ACADEMY
OF ORTHOPAEDIC SURGEONS

By _____
One of its attorneys

Thomas M. Crisham
Robert E. Ward
Pamela S. Hollis
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APPENDIX Q

[FIRST PARAGRAPH OF POINT IV OF THE RESPONDENT'S FEBRUARY 23, 1981, REPLY MEMORANDUM IN SUPPORT OF ITS "MOTION FOR TEMPORARY LIMITATION OF THE SCOPE OF DISCOVERY"]

IV. THE DEFENSE OF FIRST AMENDMENT RIGHT OF ASSOCIATION IS MADE IN GOOD FAITH

Lest there be any doubt, the Academy does not feel that the actual contents of the application files of Dr. Treister or of Dr. Marrese will substantially add to or detract from the general understanding the plaintiffs already have of the facts. And no other applicant files contain anything beyond the application form and letter informing of his or her election or failure to be elected.

APPENDIX R

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D. and MICHAEL R. TREISTER, M.D.,	)	
Plaintiffs,	)	
vs.	)	No. 80 C 1405
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendants.	)	

MOTION FOR ENTRY OF PROTECTIVE ORDER, RECONSIDERATION AND CLARIFICATION REGARDING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF NON-PARTY APPLICANTS' FILES, AND FOR EXTENSION OF TIME TO COMPLY WITH COURT'S ORDER OF MARCH 5, 1981
(March 17, 1981)

The American Academy of Orthopaedic Surgeons ("Academy") combines in this motion three separate motions arising out of the Court's Order of March 5, 1981, which may be described as follows:

(a) Motion for entry of a protective order to control the use which may be made

of the materials in the application files of Michael R. Treister and R. Anthony Marrese;

(b) A motion to reconsider and to clarify that portion of the Court's Order of March 5, 1981 which pertains to the production of membership application files of non-party physicians who unsuccessfully sought Academy membership at any time during the past ten years; and

(c) A motion to extend the time for complying with the portion of the Court's March 5, 1981 order which compels production of the application files of non-party physicians who unsuccessfully sought fellowship with the Academy during the past ten years, and supplemental production of categories of documents previously produced during the period

from 1970 to 1975.

In support of the three distinct portions of this Motion, the Academy states as follows:

(MOTION FOR PROTECTIVE ORDER)

1. A draft Protective Order applicable only to the membership application files of Dr. Marrese and Dr. Treister is attached which limits access to these materials to plaintiffs and their counsel for use in connection with this litigation only, to be returned at the conclusion of the litigation. It is understood plaintiffs are in general agreement with the principal provisions of this draft Order, and the terms of the Order flow from the Court's discussion of this issue in its memorandum opinion of March 5, 1981.

(MOTION TO RECONSIDER AND FOR CLARIFICATION OF THE COURT'S ORDER OF MARCH 5, 1981)

2. The Court's order of March 5, 1981, directed production of all Academy files pertaining to unsuccessful non-party applicants for fellowship, in addition to the files of the named plaintiffs to this case.

3. In its Memorandum Opinion, the Court states (Mem. Op. at p. 3) that the Academy does not dispute the relevancy of these documents to this litigation. The Academy disputed the relevance of the non-party application files in its arguments that point up the distinction between the Marrese and Treister files on the one hand, and the files of other unsuccessful applicants on the other. See e.g., Academy's Memorandum in Opposition to Motion to Compel at pp. 8-9, 12. The plaintiffs recognize that relevancy was contested, as Dr. Marrese responded to the argument. See, Plaintiff Marrese's Reply Memorandum . . . at p. 8.

The Academy did not dispute, on relevancy grounds, production of the files of the named plaintiffs, Dr. Treister and Dr. Marrese. It has urged and continues to urge that production of the membership application files of other non-party physicians from other parts of the country, which lack any relationship in time or geographic location to the Academy's consideration of Dr. Treister's and Dr. Marrese's applications, is improper because those files are irrelevant to this suit and their forced disclosure is not reasonably calculated to lead to the discovery of relevant information. Absent any cognizeable claim or showing that the

actual circumstances in which any particular non-party physician's application for fellowship has relevance to the claims as alleged in the corrected Amended Complaint, the compelled production of these files in the Court's Order of March 5, 1981 is improper for the reasons asserted in the Academy's previous objections, Motion to Temporarily Limit Discovery and its memoranda filed in support of those positions. The Academy urges reconsideration and deletion of thir portion of its order regarding non-party files.

4. The Counterclaim filed by the Academy based upon First Amendment and Contract causes of action seeks, in addition to monetary damages and declaratory relief, the entry of an injunction to prevent the violation of both the contract

and the First Amendment rights asserted therein, by preventing plaintiffs from continuing to harrass the Academy for the production of their files. (See, Counterclaim, Prayer for Relif on Counts II, III).

5. On November 7, 1980 plaintiffs answered the Counterclaim placing in issue the factual allegations and the legal effect of the facts stated therein.

6. The Court's Memorandum Opinion of March 5, 1981 adverted to the availability of monetary damages should the Academy prevail at trial on its Counterclaim, but omitted all references to the injuctive relief requested.

7. The effect of the Court's Order of March 5, 1981 is to deny the injunctive relief sought, because by compelling production of the records in question, the Constitutional and contact rights on

which the Counterclaim is grounded are irreparably and irreversably abrogated.

8. The Academy requests the Court to clarify its Order of March 5, 1981, to show that it is the Court's intention to deny the Academy's prayer for an injunction as set forth in its Counterclaim and strike that as an element of relief to which the Academy is entitled should the allegations of the Counterclaim be established at trial, inasmuch as compliance with the Court's Order of March 5, 1981 has that effect.

(MOTION TO EXTEND TIME FOR COMPLIANCE)

9. At the Hearing of March 5, 1981, the Court inquired of counsel for the Academy about the time that would be required for complying with its order, before counsel had an opportunity to review the Order or fully understand that

the Order also compelled production of application files of all non-party physicians rejected during the last ten years, and further called for supplemental production of other categories of documents previously produced for the 1975-1980 period.

10. The Academy and its counsel have taken steps to gather together the responsive documents, but due to the fact that the Academy employees with responsibility and knowledge necessary to complete the collection of documents have been unavailable for the past two weeks, because of the Annual Meeting of the Academy, it is not possible to comply with that portion of the Court's Order of March 5, 1981 which pertains to documents other than the applications of Dr. Treister and Dr. Marrese, within the time allowed by the

Court.

11. It is anticipated that the necessary Academy employees will return to Chicago on Monday, March 16, 1981, and will require approximately two weeks to prepare a full response.

12. Upon consultation with Mr. Cohen, counsel for Dr. Treister, he has no objection to the entry of an order extending the time for compliance with the portion of the Court's Order of March 5, 1981 regarding other than Dr. Treister's and Dr. Marrese's files for 14 days, to and including March 31, 1981. Mr. Casey, counsel for Dr. Marrese is away from Chicago and could not be reached.

(SCHEDULING OF THIS HEARING)

13. By reason of the Court's Order that compliance be completed by March 16, 1981, the Academy advised plaintiffs'

counsel of its intention to present this motion on Monday, March 16, 1981, so that the matters contained herein would be presented and decided by the Court within the time originally allowed by the Court. Because Mr. Cohen, attorney for Michael A. Treister, M.D., cannot be available on March 16, 1981, and after discussing the question of scheduling the hearing of this Motion with one of the Court's law clerks, it was agreed that this motion could be heard on Tuesday, March 17, 1981, without prejudice deriving from the fact that it was not presented on March 16, 1981.

WHEREFORE, the American Academy of Orthopaedic Surgeons respectfully prays the Court to enter the following orders:

(a) The protective order submitted herewith, to control the use of the materials contained in the fellowship

appliciation files of Dr. Treister and Dr. Marrese;

(b) An order withdrawing that portion of the Court's order of March 5, 1981 pertaining to the membership application files of non-party physicians or, in the event this Motion to Reconsider is denied, an order clarifying the Court's Order of March 5, 1981 to show that it has effectively denied the Academy's prayer for an injunction as sought in its Counterclaim, by compelling the act of disclosure which injunctive relief is sought to prevent; and

(c) An order extending the time for compliance with the Court's Order of March 5, 1981 for 14 additional days, to and including March 31, 1981.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

By: _____
One of its attorneys

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APPENDIX S

DISSENT OF JUSTICE SEYMOUR SIMON FROM THE DECISION OF THE ILLINOIS APPELLATE COURT, FIRST DISTRICT, IN TREISTER V. AMERICAN ACADEMY OF ORTHOPAEDICS, 78 ILL. APP. 3d 746, 396 N.E.2d 1225 (1979).

SIMON, Presiding Justice, dissenting:

Dr. Treister is entitled to more from this court than sympathy.

He seeks admission to a prestigious medical society, not to a social, religious, or fraternal organization like an Elks Club (see Zelenak v. Benvolent & Protective Order of Elks (App. Div. 1974), 129 N.J. Super. 379, 324 A.2d 35) or the Order of the Eastern Star (see Trautwein v. Harbourt) (App. Div. 1956), 40 N.J. Super. 246, 123 A.2d 30). He is entitled to be treated as if he were applying for membership in the Pacific Coast Society of Orthodontists (see Pinsker v. Pacific Coast Society of Orthodontists (1969), 1 Cal.3d 160, 81 Cal. Rptr. 623, 460 P.2d 495 and (1974) 12 Cal.3d 541, 116 Cal. Rptr. 245, 526 P.2d 253) or the Middlesex County Medical Society (see Falcone v. Middlesex County Medical Society (1961), 34 N.J. 582, 170 A.2d 791; accord, Blende v. Maricopa County Medical Society (1964), 96 Ariz. 240, 393 P.2d 926).

The majority opinion appears to accept this at least in part when it approves "of the opinions in Falcone and Blende which hold that a medical society cannot arbitrarily deny membership to an applicant when the society

controls access to local hospital facilities and thus can deprive the applicant of his ability to practice medicine." The majority, however, balancing the interests, frames a test of "strict economic necessity." It holds that because Dr. Treister could not in good faith allege that exclusion from practicing orthopaedic surgery, the law is unable to assist him. Except perhaps for Pima County Medical Society v. Folland (Ariz. App. 1977), 115 Ariz. 311, 565 P.2d 188, I have found no reviewing court opinion which applies Falcone so restrictively. Compare Salter v. New York State Psychological Ass'n (1964), 14 N.Y.2d 100, 248 N.Y. S.2d 867, 198 N.E.2d 250.

I believe the majority understates Dr. Treister's interest. At the same time, it overestimates the Academy's

legitimate interests, and by focusing on the effects of exclusion on Dr. Treister personally, obscures an essential aspect of this case, the nature of the Academy. The public interest at stake is also slighted. As a result, the majority opinion is needlessly reluctant about intervening in the affairs of quasi-public entities.

Part I of this dissent analyses Illinois law which, contrary to the majority's view, I believe supports Dr. Treister's complaint. Part II analyses the interests of the Academy, Dr. Treister and the public and demonstrates that fairness and public need favor Dr. Treister. In Part III my views on the broader public policy issues which surface in this case are set forth.

I.

Dr. Treister has stated a cause of action under Illinois law which I believe the majority misapplies. In Van Daele v. Vinci (1972), 51 Ill.2d 389, 282 N.E.2d 728, the supreme court considered the plaintiff's expulsion from a cooperative buying association, and said:

> "[T]his strong possibility that an important economic interest of the plaintiffs was affected by an improper administrative proceeding gives the court power and the duty to act. We agree with the view expressed by the Supreme Court of New Jersey that said: 'We are here concerned with and therefore deal solely with an organization, membership in which may here * * * be viewed as "an economic necessity"; in dealing with such an organization, the court must be particularly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objective of the organization. [citation.]' [Falcone].

> "* * * To hold otherwise would be a denial of essential rights. We agree 'that a private organization, particularly if tinged with public stature or purpose, may not expel or discipline a member adversely affecting substantial property, contract or other economic rights, except as a result of fair proceedings which may be provided for in organization by-laws, carried forward in an atmosphere of good faith and fair play.' [Citation.] The rationale for this position * * * results from the character of the organization, i.e. its assumption of a purpose which exceeds merely that of a social organization and its endeavor to benefit from various State and Federal laws." (Emphasis added.) 51 Ill.2d at 394-5, 282 N.E.2d at 731-732.

Both the facts and the language of Van Daele show that "economic necessity" is not, in this state, the towering hurdle the majority erects. Membership in Certified Grocers was less vital than membership in the Academy, for, although large, Certified Grocers

was not a monopoly. And "an important economic interest" sounds more like the Pinaker court's "substantial economic advantages" (1 Cal.3d 160, 165, 81 Cal.Rptr. 623, 626) than like the majority's standard. Indeed, Falcone itself might not pass the majority's test: The Middlesex County Medical Society, after all, could interfere with a physician's practice only in a limited geographic area. It is not clear to me why membership is any more necessary when its absence bars practice entirely, but only in a small area, than when the effect is less fatal but also continent wide.

The majority dismisses Van Daele as being a case of expulsion as opposed to exclusion. I do not see that that opinion anywhere turns on

this distinction; and I do not think an opinion that expressly agrees with the theory of Falcone, an exclusion case, should be read to be limited to expulsion cases, when it neither mentions any such distinction nor is readily susceptible to it. The reasoning of Van Daele, as I read it, applies equally to expulsion and exclusion.

Of course, membership in an organization confers rights not enjoyed by nonmembers; but members and nonmembers also have certain rights in common. The courts will at times review expulsions from organizations from which exclusion would be unreviewable. Partly this may be explainable on a theory of contract rights; and partly it derives from the fact that in the

context of many, perhaps most, associations, expulsion is a greater harm than exclusion. Expulsion is often more degrading, since it is only done for grave offenses, while people are rejected for membership every day for all sorts of reasons, many of them not personally shameful. And while someone excluded from one organization can try the next, an expelled member loses what may be a heavy investment in the organization, in time, money, and social effort. In effect, each organization is a little monopoly to its members. But this willingness to review expulsion cases was well established in the law long before Van Daele. The Van Daele court chose to ignore this body of law, and instead to rely upon ideas developed in New Jersey in an exclusion case.

Perhaps this was because the special harm caused by expulsion was not prominent on the facts of the case, and the plaintiff was seeking more than compliance with the bylaws, the usual expulsion demand: Van Daele was really more like the typical exclusion than the typical expulsion case. Whatever the court's reasons for taking this path, to me it is clear that there are now in Illinois two theories upon which courts may review association actions; one is limited to expulsion cases, the other is not; Van Daele dealt with the second strand, and so, although it was itself a case of expulsion, its doctrine applies equally to exclusion.

In large, powerful, not-very-personal organizations such as the Academy, there is not much difference,

realistically, between exclusion and explusion. When every first-class orthopaedic surgeon is expected to join the Academy, and those who are interested in such things not only look for that membership but may expressly ask about rejections, the difference between rejection and explusion is slight. And Dr. Treister needs no "investment" in membership to make him favor the Academy over its competitors for the Academy being a full-grown national monopoly has none. Dr. Treister's "investment" was the study and practice that produce an experienced orthopaedic surgeon. Thus, the nature of the association in Falcone-type cases takes the place of membership. Even on the contractual approach to membership rights, Falcone-type associations have a special character that substitutes for

the contract: the Academy is akin to a common carrier, in that it holds itself out as accepting all suitable comers, and so induces reliance upon anticipated acceptance, and discourages the formation of competing associations.

The explusion cases and the Falcone theory are not entirely separate: they address common concerns in similar situations. The explusion cases do not rest upon any magic in membership, but upon concerns recognizable in the present case. For example, in Virgin v. American College of Surgeons (1963), 42 Ill.App.2d 352, 192 N.E.2d 414, the court explained:

> "'Some associations have a stranglehold upon their members through their control of an occupation . . . which can ill be spared. . . .'
>
> . . . . . .

> "[W]rongful expulsion from a voluntary professional association has • • • a serious effect on the ability of the professional man to successfully pursue his livelihood and • • • it is a judicially protectable interest." 42 Ill.App.2d at 368-9, 192 N.E.2d at 422.

There may be merit in distinguishing expulsion and exclusion in the routine hospital cases the majority cites. But hospital cases do not justify separating exclusion from expulsion in logic-tight compartments, and contorting supreme court precedent. I believe Van Daele's standards control this case.

One might argue that Van Daele was special, in that the expulsion there was allegedly in retaliation for the plaintiff's lawsuit against the directors of the association, i.e., that the court was really concerned about protecting the judicial process. But this case raises the same concern: Dr. Treister

has suggested that the real reason for his exclusion is that he has on occasion testified in court against other doctors.

II.

Apart from any established law, I believe that logically the majority's strict economic necessity test is too stringent, and that Count I of the complaint should be sustained. The Academy is not simply a private body, accepting and rejecting applicants according to its private needs and desires. It would no doubt deny indignantly that it exists primarily to fatten its members' wallets and egos. Rather, it aspires to a more exalted function, as guardian of the profession and of the public generally. It purports to be judicious rather than exclusive. The Academy holds itself out as the sole legitimate organization of

its kind in the profession, and is widely recognized as such. It is a monopoly; and it is affiliated with the A.M.A., itself a monopoly, and no doubt with many local groups. No one who chooses (and, unsuspecting, trains, and practices) to become an orthopaedic surgeon in the United States or Canada can escape its jurisdiction. Indirectly, therefore, the public health is at stake. The power of such an association, tinged with a public stature or purpose (Van Daele, 51 Ill.2d at 395, 282 N.E.2d 728), almost a private, specialized government, should not be unbridled, but should be viewed judicially as a fiduciary power to be exercised in a reasonable and lawful manner (Pinsker, 1 Cal.2d 160, 165, 81 Cal.Rptr. 623, 460 P.2d 495, quoting Falcone).

The majority underrates the Academy's capacity to harm Dr. Treister. It is true that he has so far done quite well without Academy membership; but that is because until recently his inexperience has made him obviously unripe for membership, so that his nonmembership has been perceived as routine, temporary, and insignificant. From now on, things will be different. Count I of the complaint alleges that hospitals and insurance companies rely on Academy membership. Some of these institutions require disclosure of membership status in professional organizations like the Academy, and, in addition, specifically require disclosure of rejections from such organizations. Hospitals, insurance companies, and others know that almost all Board-certified orthopaedic surgeons

become members of the Academy 2 years after Board certification. A questionnaire or application form filled out by an orthopaedic surgeon who has not been admitted to Academy membership 2 years after his certification raises serious questions and can substantially impair the practitioner's career.

The relevation that Dr. Treister has been rejected by the Academy is going to "red-flag" every application for staff privileges or insurance that he will ever make, subjecting him to close scrutiny, and making every one of his applications a major event when it would otherwise be approved as a matter of routine. Particularly because Dr. Treister is known to meet every formal requirement for Academy membership, hospitals and insurers can logically con-

clude that he must have been excluded for incompetence or unethical conduct. It will be difficult for Dr. Treister to rebut this inference with the facts, since the Academy refuses to particularize any accusation.

Also, it is well-known that medical malpractice insurance rates have rocketed and are now a large part of the cost of practice. Although Dr. Treister is now considered a prime risk, paying the lowest rate, his premium is almost $20,000 per year. Even a modest percentage surcharge is substantial.

The more subtle effects of rejection could prove even more crippling. The emerging pattern of medical care distinguishes between internists, who have a stable patient pool, and other specialists, who rely on referrals. Because a

single patient is likely to see an orthopaedic surgeon only rarely over the course of a lifetime, while he might see an internist many times, the surgeon is peculiarly dependent on referrals. Referring doctors often use Academy membership to verify their impression of specialists, and may even find a doctor for a referral by examining the Academy membership list. New associates, necessary for the growth of a medical practice, also rely on Academy membership in evaluating an orthopaedic surgeon who seeks to employ them. Finally, many attorneys prefer Academy members as expert witnesses.

The fact that Dr. Treister has hospital privileges does not mean that he is not in trouble. Even if these hospitals know him well enough that they will never in the future be influenced

by the Academy to deny him those privileges, a lack of hospital facilities is hardly the only peril to a medical career. Also, Dr. Treister may some day desire privileges at new hospitals, which will be influenced by his rejection.

The majority's fear that there will be no way to draw the line if we allow relief to Dr. Treister is therefore unfounded. Membership in the Academy is distinctly more than "a tangible thing of value" (Salter v. New York State Psychological Ass'n, 248 N.Y.S.2d at 869, 198 N.E.2d at 251), and offers more than "educational, professional or financial advantage" (Blatt v. University of Southern California (1970), 5 Cal.App.3d at 939, 85 Cal.Rptr. at 604); and the fact that the Blatt court did hold for the Order of the Coif in California under the Pinsker

standard shows that distinctions can be made. Of course there will be more cases until the law is firmly settled; but that is a commonplace of the common law method. We have here a spectrum of possible organizations and articulable standards, and the fact that one end of the continuum is unsuitable for judicial review is simply no reason for the courts to take refuge at the extreme other end. The law should defend us from wrongs without demanding ruin and starvation.

On the other side of the balance, the Academy's legitimate interest is lighter than the majority supposes. It is important to note how modest is Dr. Treister's prayer for relief. He does not seek to compel the Academy to admit him to membership. He asks only that it consider his

application fairly, in accordance with its own bylaws and the principles of ethics established by the Academy's affiliate the A.M.A.-- a set of principles the Academy requires every member to adhere to. There should be nothing directly offensive to the Academy about doing in fact what it publicly professes to do.

The Academy is neither a social nor an operating body. It does not select members for their ability to carry out the corporate function; the members have little direct effect upon the organization of each other. The Academy is not going to fall apart by accepting someone it should not; certainly it would not be legally liable for his ineptitude, as a hospital may be for its doctors, or an employer for its servants. Rather, the

Academy functions largely as an informal accrediting body. It does offer its members some direct benefits, such as the opportunity to present papers on medical topics to the other members (and Dr. Treister has duly alleged harm from his inability to obtain these benefits); but the main advantage of membership appears to be the credential, the Academy's endorsement, relied on by others. This reliance, and therefore the value of Academy membership, depend on a general perception that the Academy is fair and accurate and follows its published standards, so that people can know and trust what they are getting when they treat membership as an indicator of professional quality. Thus, Dr. Treister is only asking that the Academy perform properly its most prominent function,

and thereby maintain honestly the reputation on which its prestige is founded.

The Academy does have an interest in holding itself aloof from judicial supervision. Obviously, it would not like the prospect of having to accept someone it does not really want but cannot justify rejecting. If the Academy's reservations are vindicated by the unwelcome members' subsequent behavior, the Academy's reputation and power will suffer from their scandals. And such a body may believe that it can discriminate among applicants more accurately if no one looks over its shoulder, and it is unrestricted in its methods. Indeed, apart from the Academy's interests, and purely as a matter of the public good, fallible judges may well hesitate to interfere with a group so successful;

its high status might be taken to indicate that its methods and judgment have proven best. This judicial modesty is commendable; but taken too seriously it would naturally lead to refusals to look at the practices even of public entities--which is not the law (Mauer v. Highland Park Hospital Foundation (1967), 90 Ill.App. 2d 409, 413, 323 N.E.2d 776).

I suggest, moreover, that both the inference of excellence and the legitimacy of the organization's demand for autarchy are impeached where the organization is so strong that membership is a practical necessity for the attainment of eminence in the profession. The reason is that such an association's rejections become self-fulfilling prophecies, not to be proven wrong by events. The association's outcast will not return

one day in glory to embarrass them, for his rejection itself dooms him to obscurity.

An ordinary organization, a hospital, say, or a university, however prestigious, must learn to appreciate the best people, for its future reputation and success depend on achievement. A hospital that capriciously spurns fine doctors will not only see the excellence demonstrated by some of its rejectees pointed to as glaring evidence of its foolishness, but will endanger the quality of its services. The effects will be visible in comparison with neighboring, fairer hospitals.

The Academy, in contrast, will hardly be blamed if American orthopaedic surgical skills are not as high as they might be. Probably, nobody will even notice a problem, because the Academy's monopoly

prevents comparisons.

The result is that an association, once it attains such influence as the Academy has, can maintain it long after it ceases to deserve its position. The Academy, if left to its own devices, can well afford to reject qualified applicants as it pleases. Its officers can indulge their prejudices and ulterior motives. The Academy has also an incentive to be overly cautious and bland, since while those erroneously rejected will pale into general practice, members who turn out badly, or are merely abrasive, will be notices, and in quantity could eventually harm the Academy's reputation.

The Academy can do these things, but only secretly: it cannot affort to be known to behave this way. For if those who rely on Academy membership as a mark

of skill and ethicality were to discover that the Academy does not after all give them fair and unbiased evaluations, they might stop depending so heavily on the Academy.

The secrecy in which such associations have historically cloaked themselves is therefore little proof of its value for legitimate purposes, and is open to sustained abuse. By keeping Dr. Treister ignorant of the reasons for his rejection, the Academy prevents him from effectively impugning its decision. In a battle without specifics, Dr. Treister's credibility against the Academy's, everyone except Dr. Treister's intimates will naturally believe the Academy, which can thus do as it will without fear of exposure. Unless the courts intervene to open the process up, such associations may main-

tain indefinitely a fraud on the public. The public interest in preventing such practices must be weighed in the law's scale.

I do not by this discussion mean to accuse the Academy, or any such group, of actually engaging in such conduct. Dr. Treister has not alleged it, and judicial review should not turn upon an almost impossible preliminary showing of a pattern of impropriety. I have been discussing possibilities and temptations, not facts The Academy is mentioned simply because it is before us. My point is that the power of groups like the Academy is so great, so self-perpetuating, so little checked by private forces, and has such potential for abuse, that the balance of interests favors judicial oversight. Every orthopaedic surgeon

desperately needs the Academy's favor; he is at its mercy; yet he has nothing to offer it; the Academy has no use for anyone in particular, though it professes to welcome all who deserve it. The Academy is more like a government than like a truly voluntary combination, and may justly be treated accordingly.

The distinction between groups which do or do not have this character is dramatic enough that it would be possible to hold a firm legal line between them. It would not be too much harder than trying to descry, without any underlying theory, the boundary between explusion and exclusion. Try, for example, to classify a failure to renew a membership, or a decision to enforce universally a rule from which someone had previously held a special exemption (Fahey v. Holy

Family Hospital (1975), 32 Ill.App.3d 537, 336 N.E.2d 309).

In summary, the balance-the-interests approach easily lends itself, upon scrutiny of the interests, to a "practical necessity" formulation reminiscent of Pinsker.

III.

I myself would not choose to make these distinctions I have been discussing, for I find the theory expounded in Part II too narrow. For me, this is an easy case. I oppose arbitrary or unfair exclusion from any organization; and I would accept cases concerning any group with enough power to influence society in a significant way and to affect seriously an applicant's career. See my dissent in Davis v. Attic Club (1977), 56 Ill.App. 3d 58, 13 Ill.Dec. 811, 371 N.E.2d 903.

The Academy's unjust rejection of applicants, resulting from unfair admissions standards and procedures, could have pernicious effects on society. The rejection of qualified applicants injures the public--whom, after all, physicians are licensed to serve--by disabling physicians who might otherwise have been able to perform great public service. Also, applicants who were accepted for membership according to unfair procedures based on arbitrary or biased standards might advance to positions of trust and importance they otherwise would not attain--and for which they were not qualified. Thus, the public has a strong and often-ignored stake in the membership practices of such societies. A professional society that uses its membership policies in the following ways

does the public a grave disservice: (i) to enforce a "conspiracy of silence" by excluding doctors who truthfully testify against other members of their professions in instances of malpractice (Ascherman v. St. Francis Memorial Hospital (1975), 45 Cal.App.3d 507, 119 Cal.Rptr. 507); (ii) to unreasonably exclude physicians who criticize sacred cows of the profession, thereby stifling creative thought and constructive criticism (Sussman v. Overlook Hospital Association (App.Div. 1967), 95 N.J.Super. 418, 231 A.2d 389); or (iii) to deny membership privileges to doctors because of their race, etc. In fact, a professional society using admission and rejection to produce such results betrays the trust of a public it exists to benefit. And it abuses the power it has acquired, advancing some to

positions they do not merit, and retarding other, more worthy, orthopaedic surgeons. I find it unconscionable that an association might engage in such conduct, even if it does not thereby succeed in driving the victims entirely out of the profession.

I believe that the proper test is not a showing of "economic impotency," as the Academy contends and the majority holds, but rather whether exclusion would "effectively impair the physician's right to fully practice his profession" (Ascherman v. St. Francis Memorial Hospital (1975), 45 Cal.App.3d 507, 511, 119 Cal. Rptr. 507, 509) and attain the highest eminence and respect in that profession that his talent and character will permit.

As, however, it is apparent that many of my colleagues do not share my

views on these broader issues, I have set out in Part II an argument for a compromise position more compatible with the majority's philosophy, and yet adequate to grant relief to Dr. Treister.

I believe Dr. Treister is entitled to a fair hearing on the application, to be judged by standards reasonably related to the Academy's purposes, and to be informed of the reasons for his rejection. I would affirm the circuit court's order sustaining Count I of the complaint and permit Dr. Treister to have a trial on the merits of that count after proper discovery has taken place.

IV.

So far as Count II of the complaint is concerned, I agree with the majority that the allegation regarding the relationship between the Academy, the American

Medical Association, the hospitals of the State of Illinois, and the State of Illinois itself is so sparse that the court can do no more than guess at what Dr. Treister's complaint in this respect actually is. I agree with the majority that this is only a conclusory charge, inadequate to sustain a claim of state action or anything else.

Count III of the complaint is based on a claim of breach of contract. It properly alleges a contract between Dr. Treister and the Academy in connection with the application he was making and how it was to be treated. (See Steinberg v. Chicago Medical School (1977), 69 Ill. 2d 320, 13 Ill.Dec. 699, 371 N.E.2d 634.) In holding, as it does, that circulating names of membership applicants to Academy members was a reasonable means of investi-

gation which the plaintiff himself authorized, the majority reads into the agreement provisions I do not find in it. Whether the dissemination of plaintiff's name and the fact that he had applied for membership was reasonably necessary to verify his credentials, professional standing, and moral or ethical character, or was inconsistent with the Academy's promise to treat the contents of Dr. Treister's application as privileged and confidential, is a matter for evidence and trial.

It would be more sensible to read into the contract a promise by the Academy to consider the application fairly and according to the bylaws. (Steinberg.) This is yet another ground for granting the plaintiff relief.

I would remand this case for full discovery and for trial on Counts I and III.

APPENDIX T

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 14, 1984

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. EISENDACH, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

R. ANTHONY MARRESE and MICHAEL R. TREISTER,

Plaintiffs-Appellees,

No. 81-2671, 83-2683 vs.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 C 1405
MILTON I. SHADUR, *Judge*.

ORDER

IT IS ORDERED, *sua sponte*, that the Opinion of this Court in the above-captioned matter, dated January 3, 1984 is amended as follows:

Page 26, line 11, delete "However, the Supreme Court has never held" and insert "However, the Supreme Court in *Kremer* did not hold".

Footnote 2, line 1, delete "The Supreme Court has stated" and insert "In *Kremer*, the Court stated" and line 6, delete "However, the Court has not stated" and insert "However, the Court did not state".

IT IS SO ORDERED.

APPENDIX U

First Amendment To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 Of The Sherman Act (15 U.S.C. § 1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 4(a) Of The Clayton Act (15 U.S.C. § 15(a))

(a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth

a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Section 4c(a) Of The Clayton Act (15 U.S.C. § 15c(a))

(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have

excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee. The court may award under this paragraph, pursuant to a motion by such State promptly made, simple interest on the total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this paragraph for any period is just in the circumstances, the court shall consider only—

(A) whether such State or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(B) whether, in the course of the action involved, such State or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(C) whether such State or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

28 U.S.C. § 1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1292(b)

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the

attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

FRCP 26(b)(1)

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had

ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

FRCP 26(c), (d)

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) **Sequence and Timing of Discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

FRCP 37(a)(4)

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in

relation to the motion among the parties and persons in a just manner.

FRCP 52(a)

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Sections 3(1)-(4) Of The Illinois Antitrust Act (Ill. Rev. Stat. Ch. 38, §§ 60-3(1)-(4))

§ 3. Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;

b. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1);

c. allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service; or

(2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce; or

(3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce; or

(4) Lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services (including master antenna television service), whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged thereof, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity or service (including cable television service or cable television relay service), of a competitor or competi-

tors of the lessor or seller, where the effect of such lease, sale or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Section 7(2) Of The Illinois Antitrust Act (Ill. Rev. Stat. Ch. 38, § 60-7(2))

(2) Any person who has been injured in his business or property, or is threatened with such injury, by a violation of Section 3 of this Act may maintain an action in the Circuit Court for damages, or for an injunction, or both, against any person who has committed such violation. If, in an action for an injunction, the court issues an injunction, the plaintiff shall be awarded costs and reasonable attorney's fees. In an action for damages, if injury is found to be due to a violation of subsections (1) or (4) of Section 3 of this Act, the person injured shall be awarded 3 times the amount of actual damages resulting from that violation, together with costs and reasonable attorney's fees. If injury is found to be due to a violation of subsections (2) or (3) of Section 3 of this Act, the person injured shall recover the actual damages caused by the violation, together with costs and reasonable attorney's fees, and if it is shown that such violation was willful, the court may, in its discretion, increase the amount recovered as damages up to a total of 3 times the amount of actual damages. The State, counties, municipalities, townships and any political subdivision organized under the authority of this State, and the United States, are considered a person having standing to bring an action under this subsection. The Attorney General may bring an action on behalf of this State, counties, municipalities, townships and other political subdivisions organized under the authority of this State to recover the damages under this subsection or by any comparable Federal law.

No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages. Provided, however, that in any case in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions. Provided further that no person other than the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act.

Beginning January 1, 1970, a file setting out the names of all special assistant attorneys general retained to prosecute antitrust matters and containing all terms and conditions of any arrangement or agreement regarding fees or compensation made between any such special assistant attorney general and the office of the Attorney General shall be maintained in the office of the Attorney General, open during all business hours to public inspection.

Any action for damages under this subsection is forever barred unless commenced within 4 years after the cause of action accrued, except that, whenever any action is brought by the Attorney General for a violation of this Act, the running of the foregoing statute of limitations, with respect to every private right of action for damages under the subsection which is based in whole or in part on any matter complained of in the action by the Attorney

General, shall be suspended during the pendency thereof, and for one year thereafter. No cause of action barred under existing law on July 21, 1965 shall be revived by this Act. In any action for damages under this subsection the court may, in its discretion, award reasonable fees to the prevailing defendant upon a finding that the plaintiff acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Section 2-614 Of The Illinois Code Of Civil Procedure

§ 2-614. Joinder of causes of action and use of counterclaims. (a) Any plaintiff or plaintiffs may join any causes of action, against any defendant or defendants; and the defendant may set up in his or her answer any and all cross claims whatever, whether in the nature of recoupment, setoff or otherwise, which shall be designated counterclaims.

(b) The court may, in its discretion, order separate trial of any causes of action, counterclaim or third-party claim if it cannot be conveniently disposed of with the other issues in the case. Legal and equitable issues may be tried if no jury is employed.

AMICUS CURIAE

BRIEF

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No. 83-1452

In The

Supreme Court of the United States

October Term, 1983

R. ANTHONY MARRESE and MICHAEL B. TREISTER,

Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondent.

BRIEF OF AMICI CURIAE STATES OF ILLINOIS, INDIANA AND WISCONSIN ON BEHALF OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

In an exclusive federal action, may a federal court of appeals ignore the mandates of 28 U.S.C. 1738 and *Migra v. Warren City School District Board of Education*, ... U.S. ....., 104 S.Ct. 892 (1984), and give a state court judgment greater preclusive effect in a federal action than it would have in the rendering state?

Do professional associations have a special First Amendment privilege that shields their membership files from discovery?

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In The

Supreme Court of the United States

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B. ANTHONY HARRIS and MICHAEL B. TRENTER,

Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondent.

BRIEF OF AMICI CURIAE STATES OF ILLINOIS, INDIANA AND WISCONSIN ON BEHALF OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IDENTITY AND INTEREST OF THE AMICI CURIAE

The States of the Seventh Circuit Court of Appeals, Illinois, Indiana, and Wisconsin, respectfully submit this brief *amici curiae* in support of granting the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Attorneys General of the *Amici* States are the chief law enforcement officials of their respective states.

Because of their role, these Attorneys General are greatly interested in the correct application of the laws of the United States, and the decisions of both this Court and the Seventh Circuit Court of Appeals. Since the Seventh Circuit's decision is contrary to its prior pronouncements, as well as the mandates of Congress and this Court, the *Amici* support granting of the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF FACTS

Petitioners, Dr. R. Anthony Marrese and Dr. Michael R. Treister, are orthopaedic surgeons who applied for membership in the American Academy of Orthopaedic Surgeons in 1975 and 1974 respectively. Both were denied membership without a hearing or statement of reasons.

In 1976, Treister filed a lawsuit in the Circuit Court of Cook County, State of Illinois, alleging that: (1) the Academy did not follow its by-laws in processing his application; (2) the Academy violated his due process rights by refusing him membership; and (3) the Academy breached its written agreement of confidentiality with him by publishing his name in a list of applicants.

Marrese's state law suit alleged that: 1) the Academy refused to allow him a fair hearing on his application, and 2) the Academy's rejection of his application denied him due process under the United States Constitution and the Constitution of the State of Illinois.

The petitioners did not file a claim under the Illinois Antitrust Act in the state court action, nor did they contemporaneously file a federal antitrust suit.

On January 24, 1977, the circuit court heard argument and struck the two counts of Treister's complaint that alleged a breach of contract and violation of his constitutional rights. The court sustained the count regarding the failure of the Academy to follow its by-laws.

In the course of ensuing discovery, the Academy refused to respond to Treister's document request. After an *in camera* inspection, Judge Berg ordered that Dr. Treister's personal admissions file be produced by the Academy. The Academy refused to obey the order and that discovery issue was certified for appeal. The appellate court found, *inter alia*, that it was unnecessary to review the discovery order since Treister had failed to state a cause of action.

The petitioners filed this action on March 21, 1980 in Federal District Court for the Northern District of Illinois for damages and injunctive relief under Section 1 of the Sherman Act. The complaint charged denial of membership because: 1) the petitioners competed too vigorously, and 2) Treister had testified for a plaintiff in a medical malpractice suit against one of the members of the Academy. The respondent moved to dismiss the complaint claiming that the prior state court judgment barred the suit under the doctrine of res judicata. Judge Shadur denied the motion. *Treister v. American Academy of Osteopaedic Surgeons*, 496 F.Supp. 236 (N.D. Ill. 1980) *on reconsideration*, 524 F.Supp. 389 (N.D. Ill. 1981).

Pre-trial discovery commenced and the petitioners requested that the Academy produce all the admission files of applicants that were denied admission to the Academy in the last ten years (1970-1980). The Academy resisted

the discovery requests on First Amendment and contract grounds. On March 5, 1981, upon motion of the plaintiffs, (*see* Pet. App. K), Judge Shadur entered a production order for all the requested files subject to an "eyes only" protective order. On March 17, 1981, the Academy filed a tripartite motion seeking: a) a protective order for the files of the plaintiffs; b) reconsideration and clarification of the March 5, 1981, production order pertaining to non-party physicians who were denied membership; and c) an extension of time to comply with the March 5, order. (*See* Pet. App. R). On April 7, 1981, Judge Shadur entered his own protective order that was derived from the parties submissions. (*See* Pet. App. L and M). The Academy did not seek an *in camera* inspection, or any redaction. The Academy immediately appealed to the Seventh Circuit, and an order staying discovery was entered. After briefing, the appeal was dismissed and the stay order vacated. The Academy's continued refusal to produce the requested documents resulted in the plaintiffs seeking sanctions in July and August of 1981. Finally, after admitting the requested documents were in their possession, and waiving the issuance of a rule to show cause, the Academy was held in criminal contempt of court and fined $10,000.00. (*See* Pet. App. N)

A panel of the United States Court of Appeals for the Seventh Circuit reversed the judgment of contempt. 692 F.2d 1093. Rehearing en banc was requested and granted. Prior to the rehearing, the order granting rehearing en banc was vacated. A new decision was issued that reversed the contempt judgment but on narrower grounds than the prior opinion. 706 F.2d at 1499. The petitioners again successfully sought rehearing en banc. However, before the rehearing took place, the trial court certified for immediate appeal the order that denied the Academy's

motion to dismiss the complaint based on the doctrine of res judicata.

On September 16, 1984, the appeal from the contempt judgment was consolidated with the appeal from the denial of the motion to dismiss for purposes of rehearing en banc. On September 20, 1983, the combined rehearing en banc was held.

On January 3, 1984, the Seventh Circuit Court of Appeals issued the decision which is sought to be appealed to this Court. The Seventh Circuit's decision: 1) reversed the criminal contempt judgment, and 2) dismissed the underlying action because the state-court judgment barred the subsequent federal antitrust action on res judicata grounds. This plurality decision split the court 5-4 on the two issues. The Judges rationales were divided differently on each issue.

In reversing the contempt judgment, the plurality reviewed the underlying discovery order and found that the Academy had "if not a First Amendment right, a First Amendment interest," in its membership files. This "right or interest" was to be protected by limiting discovery. In dismissing the underlying action, the plurality found that: 1) 28 U.S.C. 1738 was inapplicable because Illinois courts could not hear a federal antitrust case (Slip Op. at 7); and 2) nothing prevented a federal court from giving a state-court judgment greater preclusive effect in a federal action than in a state court. (Slip Op. 7, 26). This *amicus* petition addresses these issues.

REASONS FOR GRANTING THE WRIT

I.

THE PLURALITY OPINION MISAPPLIED THE DOCTRINE OF RES JUDICATA.

A. The Plurality Erred In Giving A State Court Judgment Greater Preclusive Effect Than It Would Have In State Court In Contravention Of Recent Supreme Court Precedent.

In reaching its unprecedented decision, the plurality held that a state court judgment can have *greater* preclusive effect in federal court than in state court. (Slip Op. at 7 and 26, Pet. App. at A-7 and A-26). This misconception is contrary to Title 28 U.S.C. Sec. 1738,[1] as well as recent decisions by this Court which require federal courts to give a state court judgment the same preclusive effect as it would have in the rendering state.

This Court most recently spoke on the issue of the preclusive effect of a state court judgment in a federal action in *Migra v. Warren City School District Board of Education*, No. 82-739, ... U.S. ....., 104 S.Ct. 892 (1984). In *Migra*, the court found "that it is now settled that a federal court must give a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Id.* This principle has also been recently stated by this Court in *Hoving v. Pronise*, ... U.S. ....., 103 S.Ct. 2368

[1] 28 U.S.C. Sec. 1738 provides in pertinent part: "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

(1982); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980). *Accord, Union & Planters Bank of Memphis v. City of Memphis*, 189 U.S. 71 (1903); *Mandarino v. Pollard*, 718 F.2d 945 (1983).[2] The basis for these decisions was the statutory requirements of 28 U.S.C. 1738.

The plurality claims, however, that section 1738 is inapplicable as a matter of primary jurisdiction because an Illinois court lacks jurisdiction to hear a federal Sherman Act case. (Slip Op. at 7, Pet. App. A-7) No authority is cited for the plurality's position and indeed none exists. It is well recognized that, absent federal law to the contrary, a federal court must apply the laws of the rendering state in order to determine what preclusive effect a state-court judgment should be given. *Migra, Hoving, Kremer, Allen.* The plurality ignores this mandate.

The dissent points out that "[t]he plurality has thus overlooked the policy interests of the rendering forum in predicting the preclusive effect of its own judgments. In addition, by rejecting the Illinois law of res judicata in the guise of improving upon it, the plurality has undermined the Illinois law to which it purports to defer." (Slip Op. at 51, Pet. App. at A-51). The plurality's new "federal rule", which employs vague, *ad hoc* reasoning to give the Illinois judgment greater preclusive effect in the federal court, effectively forecloses judicial foresight as to the precise preclusive effect of state court judgments.[3]

[2] In light of *Migra*, the 7th Circuit has reconsidered the posture it took in the case sub judice and is now in accord with *Migra*. See, *Hagen v. City of Evanston*, No. 80-1712, ... F.2d ..... (7th Cir. March 8, 1984).

[3] As the dissent also notes, the plurality's "reading of Sec. 1738 (to allow greater preclusive effect) might offend state policies

(Footnote continued on following page)

Predictability of the effect of state-court judgments is particularly important to the *amici* because they are the chief legal officers and law enforcement officials of the states. The plurality's decision has departed so far from the accepted and usual course of judicial proceedings that it prevents the *amici* from formulating sound advice and policy in the enforcement of state law in state courts.

B. The Plurality's Decision Abolishes The Jurisdictional Competency Requirement Necessary To Bar A Suit Under The Doctrine Of Res Judicata.

Under Illinois law, like Federal law, a prior judgment is given preclusive effect over a pending claim only if the rendering court would be competent to hear the pending claim. *Spiller v. Continental Tube Co.*, 95 Ill. 2d 423 (1983); *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981). Since Illinois courts are not jurisdictionally competent to hear exclusively federal claims, a prior decision by an Illinois court cannot bar a subsequent Sherman Act suit. (Slip Op. at 51-53). The great weight of authority is in accord. *See R.E. Data Corp. v. Department of Social Services*, 684 F.2d 192 (2d Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *Kurek v. Pleasure Driveway and Park District of Peoria*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Hayes v. Solomon*, 597 F.2d 958 (5th Cir. 1979); *Clark v. Watchie*, 513 F.2d 994 (9th Cir. 1975), *cert. denied*, 423 U.S. 841 (1975); *Abramson v. Pennwood Investment Corp.*, 392

6 *continued*
limiting the res judicata effects of judgments," . . . . (citing, Currie, Res Judicata: the Neglected Defense, 45 U. Chi. L. Rev. 317, 327 (1978)) (Slip Op. at 51, Pet. App. at A-51). This decision will destroy, instead of advance, comity between the state and federal systems.

F.2d 759 (2nd Cir. 1968); *Cream Top Creamery v. Dean Milk Company*, 383 F.2d 358 (6th Cir. 1967); and *Lyons v. Westinghouse Electric Corporation*, 222 F.2d 184 (2nd Cir. 1955).

In *Moitie*, *supra*, this Court stated; "There is little to be added to the doctrine of res judicata as developed by the case law of this Court. A final judgment on the merits of an action precludes the parties and their privies from relitigating issues that were or *could* have been raised in that action." *Id.* at 398. *See also Hagee* (Slip Op. at 3-4). Even though the plurality in this case recognized that the federal antitrust claim could not have been raised in the prior state suit, it nevertheless held that the prior suit would have preclusive effect on the subsequent federal antitrust suit. Thus, the plurality unequivocally has done away with the jurisdictional competency element of the res judicata test established by this Court.

C. The Doctrine Of Collateral Estoppel Does Not Support The Plurality's Conclusion.

It is recognized that under the doctrine of collateral estoppel, a state-court adjudication of facts will have a preclusive effect in a subsequent exclusive federal action as to the factual issues adjudicated in state court. *Lektro-Vend Corp. v. Vendo Corporation*, 500 F. Supp. 332 (N.D. Ill. 1980), *aff'd* 660 F.2d 255 (7th Cir. 1981). *See also Abramson* at 702; *Cream Top Creamery* at 362, 363. However, this preclusive rule applies only to *factual* issues actually litigated, and cannot preclude an exclusively federal *claim* involving unresolved factual issues.

D. The Meager Support For The Plurality Opinion Is An Exception To The Prevailing Rule And Is Clearly Distinguishable.

The plurality relies heavily on *Nash v. The Biltmore Company*, 640 F.2d 484 (4th Cir. 1981). However, *Nash* should not be followed because, as the dissents point out:

1) It eliminated the requirement of jurisdictional competency established by this court in *Federated Department Stores v. Moitie*; (Slip Op. at 58, Pet. App. at A-57).

2) It involved strong equitable considerations. The first state law suit was settled by the entry of a negotiated *consent decree*. (Slip Op. at 58, Pet. App. at A-58).

3) It involved state statutes that were identical to the federal statutes. (Slip Op. at 59, Pet. App. at A-59).

4) It "did not even suggest that a prior state court action, as different from the subsequent exclusively federal actions as the prior state court actions here, could constitute the same 'cause of action' ". (Slip Op. at 60, Pet. App. at A-60).

5) It involved an attempt to *re*-litigate an antitrust claim (Emphasis in original) (Slip Op. at 24, Pet. App. at A-59).

In spite of these significant distinctions between *Nash* and the instant case, the plurality attempts to fit this case into the reasoning of *Nash*. Success in this attempt is achieved only by means of unrestrained speculation about both the plaintiffs' motives in bringing the federal action after their state suit, (Slip Op. 10, 11, Pet. App. at A-10, 11), and also the supposed insignificance of the enhanced damage remedy which was available to the federal antitrust action but which may not have been available in a

state antitrust action (Slip Op. 10, 11, Pet. App. at A-10, 11).[4]

The second case that allowed a prior state-court judgment to preclude a subsequent federal antitrust action was *Derish v. San Mateo-Burlingame Bd. of Realtors*, No. 83-1791, 1984-1 (CCH) Trade Cases Par. 65,771 (9th Cir. 1983). In *Derish*, like *Nash*, the suit involved the same claim, the same facts, and the same evidence. The only difference was that the plaintiffs brought their federal case under the Sherman Act. Again, the second suit would have been a relitigation of the prior claim. The same reasons that distinguished *Nash* from the instant case also apply to *Derish*. Additionally, the courts in *Nash* and *Derish* acknowledged that if different liability standards exists between the statutes, then res judicata will not apply. Derish at p. 6029, *citing Clark v. Watchie*, 513 F.2d 994 (9th Cir. 1975).

E. Effect Of The Decision Upon State Law Enforcement.

Finally, this decision undermines the *amici*'s ability to enforce state law. For example, this newly broadened scope of res judicata, combined with the *amici* role of representing a myriad of state agencies, will result in extremely difficult litigation problems. The *amici* states will have to ensure that a state action could not be construed as a possible bar to a subsequent federal claim. Secondly, it strips the *amici* of their ability to make sound enforcement policy. The uncertainty that flows from the

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[4] Treble damages are automatically available for any violation of the federal antitrust laws, 15 U.S.C. Sec. 15, while treble damages are available only under limited circumstances under the Illinois Antitrust Act. Ill. Rev. Stat., Ch. 38, Sec. 60-1 *et seq.*

plurality's free-wheeling conjecture in its res judicata analysis makes predicting the preclusivity of a judgment impossible. Lastly, it strips state judges of all previous guidance they had in determining the preclusive effect of their decisions. Hence, this decision frustrates the goals of the res judicata doctrine by fostering needless and complex litigation.

II.

THE MAJORITY ERRONEOUSLY LIMITED DISCOVERY OF THE PROFESSIONAL ASSOCIATION'S MEMBERSHIP FILES BY ITS UNPRECEDENTED BESTOWAL OF "AT LEAST A FIRST AMENDMENT INTEREST" IN THOSE FILES.

The majority found that the Academy had, ". . . if not a First Amendment right, at least a First Amendment interest . . .", in its membership files. (Slip Op. at 17, 18, Pet. App. at A-17, 18). The majority's reasons for bestowing the Academy's files with a First Amendment interest were: 1) ". . . it is a forum for exchange of information about surgical techniques and related matters of substantial public interest" (Slip Op. at 18, Pet. App. at A-18), and 2) discovery of its membership files ". . . will erode the atmosphere that encourages the free exchange of ideas" (Slip Op. at 18, Pet. App. at A-18).

A. The Opinion Is Not Supported By Case Law.

The cornerstone of the majority's rationale is *NAACP v. Alabama*, 357 U.S. 449 (1958), where the Supreme Court recognized a First Amendment right of associations to express ideas that insulated the NAACP's membership list from pretrial discovery. (Slip Op. at 18, Pet. App. at A-18). However, *NAACP v. Alabama* is easily distinguishable from the case at bar.

First, the function of the Academy is significantly different from that of the NAACP. The Academy is a group of competitors that band together and discuss not only their surgical techniques and ideas, but also which competitors should be admitted into its ranks. Moreover, membership in the Academy can directly affect a physician's occupational status. For example, an orthopaedic surgeon cannot be admitted to certain sub-specialties (sports medicine and foot surgery) without being a member of the Academy.

The *NAACP*, on the other hand, is a group of people in different professions that advocate a political opinion. Indeed, the members of the NAACP are not from a homogenous group of competitors, cannot affect occupational status, and have no effect on competition in any market.

Furthermore, in *NAACP v. Alabama*, the Association was faced with total curtailment of its existence in the State of Alabama. The government sought discovery of all members regardless of their function in the Association. *NAACP v. Alabama* at 1166. However, in the case sub judice, the Academy is not faced with total eradication nor is disclosure of its entire membership list sought. Additionally, the discovery here would not subject its members to the type of pressures that existed in Alabama in the 1950's regarding the civil rights movement. Petitioners merely sought: 1) the contents of petitioners' own membership files and, 2) the contents of the applicants files that were denied membership from 1970-1990. These requests were subject to appropriate protective orders. Discovery was limited to the applications process, and not an attack on "the forum for the exchange of ideas". Hence, the existence of the Academy was not in any way threatened.

Assuming arguendo that the Academy did have a First Amendment right or interest in its membership files, no reason exists to bar inquiries into the process used to determine membership. "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute", *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 at 514 (1972), citing *Gibonay v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949). "First Amendment rights may not be used as means or the pretext for achieving substantial evils". *California Motor Transport* at 514, citing *NAACP v. Button*, 371 U.S. 415 (1963). This Court has recognized that when the discovery will produce evidence material to the proof of a critical element of the plaintiff's cause of action, even Constitutional privileges must give way. *Herbert v. Lando*, 441 U.S. 153 (1979).

B. The Decision Was Based On A Series Of Misconceptions.

Curiously, the majority faults the lower court for not following the procedure of *in camera* inspection and redaction set forth in *EEOC v. University of Notre Dame Du Lac*, 715 F.2d 331 (7th Cir. 1983). (Slip Op. at 19-20, Pet. App. at A-19,20).[4] In point of fact, however, the state court trial judge made an *in camera* inspection of the files and ordered production. *Treister v. American Academy of Orthopaedic Surgeons*, 78 Ill.App. 3d 746 (1st Dist. 1979). Moreover, the Academy was given two opportunities to produce redacted files, but refused both. (Slip Op. at 20, Pet. App. at A-20).

[4] In *EEOC v. University of Notre Dame Du Lac*, the Seventh Circuit recognized a First Amendment qualified privilege "protecting academic institutions against disclosure of the names and identities of persons participating in the peer review process." *EEOC* at 337.

Moreover, in *EEOC*, the court's recognition of a qualified academic privilege was in accord with other courts. *Id.* at 337. However, in the instant matter, the Seventh Circuit's treatment of professional associations as a privileged class is contrary to decisions of this and other courts, and improperly creates a new privilege.

The majority also goes beyond the bounds of normal judicial proceedings when it creates a First Amendment right/interest in an association that the court does not fully understand. "[T]he exact nature of the Academy is unclear from the limited record before us". (Slip Op. at 12, Pet. App. at A-12). This uncertainty is mirrored in the majority's failure to define a "professional association".[5] While doctors, lawyers and engineers are professionals, no First Amendment privileges have been created for their associations. *See, Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 772 (1975).

In addition, the majority endows the Academy with this First Amendment right/interest based on it being, "a professional association and a forum for exchanges of information about surgical techniques and related matters of substantial public interest." Slip Op. at 18, Pet. App. at A-18. Yet this argument for treating professional associa-

[5] The problems with this new privilege are compounded since it is unclear which associations qualify as "professional". This decision opens the door for any trade association to make the argument of a First Amendment right/interest protecting it from discovery.

tions as a privileged class because of their lofty ideals and important public impact has been argued before this Court and rejected. *See, Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Furthermore, despite the Seventh Circuit's dissatisfaction with the trial court's protective order, Judge Shadur used the balancing test that the Seventh Circuit approved in *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981). The test requires the court "to weigh the need for truth against the importance of the relationship or policy sought to be furthered by the privileges and the likelihood that recognition of the privilege will protect that relationship in the factual setting of the case." *Id.* at 1062, *citing Ryan v. Commissioner of Internal Revenue*, 568 F.2d 531 at 543 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). Judge Shadur's *Memorandum Opinion And Order* (Pet. App. K) shows that he carefully balanced the interests of the parties, the claims of privilege, and the public policy considerations.

C. This Unwarranted Impediment To Legitimate Discovery Will Frustrate Antitrust And Other Law Enforcement Efforts.

Finally, this Court has recognized two important precepts that the Seventh Circuit has ignored. First, evidentiary privileges are to be narrowly construed because they impinge on the truth seeking process. "Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances". *Herbert v. Lando*, 441 U.S. 153, at 175, *citing United States v. Nixon*, 418 U.S. 683 (1974). This Court went on to say that "[w]hatever their origins, these

exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth". *Id.* at 710.[7]

The second precept is the importance of unimpeded antitrust enforcement. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms". *United States v. Topco Associates*, 405 U.S. 596, at 610 (1972).

Judge Wood best summarized the impact of the new privilege created by the court below:

> "All varieties of trade associations and other types of organizations, from civic clubs to country clubs should rejoice in their improved status and newly-fashioned protection from troublesome inquiries. Individuals and agencies, however, who have legitimate antitrust, discrimination, and other claims against such organizations have little reason to rejoice." (Slip Op. at 36-37, Pet. App. at A-36-37).

[7] Consistent with this approach, this Court most recently struck down a Second Circuit decision that created an accountant work product privilege. *United States v. Arthur Young & Company*, No. 82-687, ___ U.S. ___, 52 U.S.L.W. 4355 (March 21, 1984).

CONCLUSION

For the foregoing reasons the *Amici* support granting the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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RESPONDENT'S

BRIEF

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No. 83-1452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

R. ANTHONY MARRESE, M.D. and MICHAEL R. TREISTER, M.D.,

Petitioners,

vs.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondents.

Brief in Opposition To Petition For Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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STATEMENT OF THE CASE

Certain material facts omitted from the Joint Petition for Writ of Certiorari, and not appearing in the Seventh Circuit opinion are set forth below.

1. The American Academy of Orthopaedic Surgeons (Academy) is a voluntary membership society of orthopaedic surgeons, organized as an Illinois not-for-profit corporation.[1]

> The American Academy of Orthopaedic Surgeons (AAOS) is a nonprofit corporation composed of about 9,000 medical doctors who specialize in orthopaedic surgery. More than 75 percent of the total number of board-certified orthopaedic surgeons in the United States belong to AAOS. AAOS conducts continuing medical education courses for practicing orthopaedic

[1] The Academy had no parent, subsidiary, or affiliate companies.

surgeons and persons working in related areas, including orthopaedic nursing, occupational therapy, physical therapy, and manufacturing braces and artificial limbs.

Wilk vs. *American Medical Assn.*, 719 F.2d 207, 212 (7th Cir. 1983), *cert. den.*, May 21, 1984.

2. The Academy's programs are open to any interested medical and osteopathic physician, regardless of specialty. Both members and non-members serve as faculty. Treister and Marrese have attended educational programs sponsored by the Academy on several occasions, and Treister has presented a scientific exhibit at an Academy meeting (R. 91, Ex. 1).

3. Election to membership requires a two-thirds vote of the Academy's board of directors. To be considered, an applicant must be a board certified orthopaedic surgeon and have practiced orthopaedic surgery for at least three years. (R. 4, Ex. B, p. 8) The Academy's board considers the voluntarily submitted views of its members about the applicant's professional standing and qualifications. The Academy's members are sent a list of all applicants. Any member may submit comments on his experience with and opinions about any applicant with whom he has had professional contact. (R. 4, Ex. B, p. 8)

4. The Academy assures both its applicants and its members of the complete confidentiality of their participation in the application process. The Academy's by-laws advise its members that the application for membership and the results of any investigation, inquiry, or response received are "privileged and confidential" and not subject to disclosure, even by operation of law. This assurance is based on the signed, written agreement of the applicants. Petitioners signed such an agreement when they applied for membership in 1975.

In consideration of the Academy's confidential treatment of the information in an applicant's application and information obtained in any investigation, the applicant agrees (a) to treat that information as privileged and confidential, (b) to

authorize the Academy to investigate his or her credentials, professional standing, and character, and (c) not to cause, nor attempt to cause any disclosure of the application contents or of the admissions committee proceedings by operation of law, or otherwise. (R. 4, Ex. A, p. 24) The Academy relied on petitioners' agreement when it conducted its normal investigation and presented their applications to the board of directors.

5. In petitioners' suit, the Academy filed a counterclaim for injunctive relief and money damages based on the written agreement by petitioners for confidentiality. Petitioners answered the counterclaim and it is still pending.

6. In support of the Academy's motion to temporarily limit discovery of its membership application files pending completion of discovery on the issue of economic injury, filed prior to entry of the production order, the Academy filed the affidavit of Dr. Charles Heck, executive director of the Academy and himself an orthopaedic surgeon. Heck testified to the nature of the Academy, to the participation of non-members, and to the personal participation of petitioners in prior Academy meetings and programs. He also testified that orthopaedic patients are not commonly referred from one orthopaedist to another and that primary care physicians who do have occasion to refer orthopaedic patients, do not have access to any directory of Academy members (R. 91 Ex. A). Petitioners did not controvert Heck's testimony with any sworn statement.

REASONS FOR NOT GRANTING THE WRIT

The decision below is consistent with both the principles and the purposes of res judicata (claim preclusion). It also furthers the purposes of 28 U.S.C. § 1738. Both res judicata and the full faith and credit requirement serve vital public interests and are not to be circumvented by technicalities or distortion of established principles. Although petitioners attempt to do so, they have not demonstrated any valid

competing public interest which would even make it necessary for this court to balance such interests.

1. Petitioners seek to justify the splitting of their cause of action between state and federal courts on the basis of the federal court's exclusive jurisdiction of alleged federal antitrust claims. Not only does this frustrate the vital public interests served by res judicata, but the rationale is predicated on a distortion of the res judicata doctrine.

Both petitioners first sued the Academy in the Illinois courts based on common law claims arising out of the Academy's rejection of petitioner's initial membership applications. These suits ended in judgments for the Academy. Petitioners next sued the Academy in federal court asserting federal antitrust claims arising out of the Academy's rejection of their initial membership applications. Petitioners do not contend that the Illinois judgments were not final judgments on the merits or that there is not an identity of cause of action or parties in their first and second lawsuits. These are the essential elements of the res judicata doctrine. *Nash County Board of Education* v. *Biltmore Co.*, 640 F.2d 484, 486 (4th Cir. 1981), *cert. den.*, 454 U.S. 878 (1981).

The purposes of the res judicata doctrine are to protect litigants from the expense and vexation attending multiple lawsuits, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana* v. *United States*, 440 U.S. 147, 153 (1979). By filing two lawsuits against the Academy to redress the same alleged wrong—rejection of their membership applications—petitioners have imposed the expense and vexation of multiple lawsuits upon the Academy. By asking two different courts for judicial relief of the same alleged wrong, petitioners have squandered judicial resources.

2. To justify frustrating res judicata's purposes, petitioners do more than rely on the federal court's exclusive jurisdiction of federal antitrust claims. In addition they distort portions of two distinct elements of the res judicata doctrine

to argue that the forum of the first lawsuit must have had jurisdiction, not only of the claim presented in that lawsuit, but of the claim asserted in the second lawsuit. No such requirement exists. Instead the first forum is required to have jurisdiction of the claim filed in it.

a. Petitioners have misread the discussion of jurisdiction in *People* v. *Kidd*, 398 Ill. 405, 75 N.E.2d 851 (1947). (Pet. 11 and dissents below, App. A-52—A-53) *Kidd* states, "The doctrine of res judicata*** is that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties***." 75 N.E.2d at 853. The court then noted that res judicata requires a determination that the former adjudication was a final judgment upon the merits "within the jurisdiction of the court rendering it." The reason for this qualification is that a judgment by a court lacking subject matter jurisdiction is null and void and thus may be collaterally attacked. 75 N.E.2d at 854. Petitioners completely reverse the "judicial competency" requirement by seeking to apply it to the first forum's jurisdiction to hear the second claim rather than the first.

b. As the second step of their "judicial competency" argument, petitioners distort the concept used to measure the effect of res judicata. The doctrine is said to preclude the relitigation of issues which were or "could have been" raised in the prior action. *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 401–402, 69 L. Ed. 2d 103, 108, 101 S. Ct. 2424 (1981). Because the state court forum selected by petitioners had no jurisdiction of the federal antitrust claim, petitioners argue that the claim could not have been raised before and, thus, is not precluded.

This construction would measure the effect of res judicata, not by the choices available to a plaintiff at the time his cause of action accrued, but by the choices remaining after he has chosen a forum. Whether the vital public interests of res judicata are served would then be within the plaintiff's control. This would encourage plaintiffs to split their causes

of action between state and federal courts to provide a second bite of the apple.

The interests protected by res judicata are too important to allow frustration by such a twisting of its concepts. In *Federated*, the court noted that res judicata serves vital public interests; is consistent with public policy which dictates that there be an end to litigation; is not a mere matter of practice or procedure left over from a more technical time, but is a rule of fundamental and substantial justice; and, further, that no principle of law or equity sanctions a rejection of res judicata. *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. at 401–402.

3. Petitioners' contention that 28 U.S.C. § 1738 prevents the federal court from giving preclusive effect to the state-court judgments is flawed in three respects. First, because federal courts have exclusive jurisdiction of federal antitrust claims, no state is ever called upon to determine the preclusive effect of its own judgments on a later federal antitrust claim. Second, petitioners' contention is predicated on their own distortion of res judicata principles, i.e., "could have been raised" refers to claims which can be raised only after plaintiff selects his forum. Third, use of § 1738 to deny preclusive effect to the Illinois judgments is contrary to the statute's purpose of promoting comity and federalism, preventing vexatious litigation, and conservation of judicial resources.

a. Section 1738 requires state judicial proceedings to have the same full faith and credit in federal courts "as they have by law or usage in the courts of such State***from which they are taken." Because of the federal court's exclusive jurisdiction of federal antitrust claims, neither Illinois nor any other state has ever had to determine the preclusive effect of an earlier judgment in its courts on a later federal antitrust claim. In the absence of any Illinois law, the preclusive effect must be determined either on the basis of federal res judicata law or by assuming, for the purpose of determining res judicata's applicability, that a federal antitrust claim could be filed in Illinois courts and then applying Illinois res judicata principles.

Under federal law, there is identity of causes of action for res judicata purposes if both claims arise out of the same basic factual situation. *Hirsh* v. *Continental Illinois National Bank & Trust Co.*, 596 F.2d 205, 209 (7th Cir. 1979). An earlier suit based on breach of contract barred a later suit based on a federal antitrust action when both actions were based on the same operative facts. *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 295 F.2d 362, 364 (5th Cir. 1961).

Similarly, Illinois holds that a "cause of action" in a res judicata context is simply a set of facts establishing a right to relief under any theory plaintiff could have asserted in his first suit, even though the single group of operative facts supports different kinds of relief or different theories of recovery. *Hilti, Inc.* v. *Griffith*, 68 Ill. App. 3d 528, 386 N. E.2d 63, 66 (1978) and *Pierog* v. *H.F. Karl Contractors, Inc.*, 39 Ill. App. 3d 1057, 351 N.E.2d 249, 252–253 (1976). Thus, under both federal and Illinois law, assuming Illinois courts had jurisdiction of a federal antitrust claim, the essential elements of res judicata are present—a judgment on the merits and identity of both cause of action and parties.

b. The assertion that section 1738 prevents giving preclusive effect to the state court judgments is predicated on petitioners' insistence that the determination of what claims could have been raised is made only after a plaintiff has selected his forum. This ignores the fact that petitioners were in an offensive posture in their state court proceedings and could have filed first in federal court had they wanted to litigate their federal antitrust claim in a federal forum. *See, Migra* v. *Warren City School District Board of Education*, ____ U.S. ____, 79 L. Ed. 2d 56, 64 n.7, 104 S. Ct. 892 (1984).

c. Petitioners' interpretation of §1738 would deny full faith and credit to a state court judgment. As noted above, it

would do so not just on a technicality, but a technicality resulting from a distortion of aspects of the res judicata doctrine. Section 1738 is designed to promote the interests of comity and federalism by giving finality to state court judgments. *Kremer* v. *Chemical Construction Corporation*, 456 U.S. 461, 478 (1982). When a state court has adjudicated a claim, the res judicata doctrine serves to promote comity between state and federal courts. *Kremer*, 456 U.S. at 270 n. 6. This court has noted that the statute "embodies the view that it is more important to give full faith and credit to our state-court judgments than to insure separate forums for federal and state claims." *Migra*, 79 L. Ed. 2d at 64. The language of the statute is designed to insure that state judgments are not given less effect in the federal court than they would have in the state court. The opinion below does not give less effect to the state court judgments. Instead, it establishes the finality of the state court judgments and does so consistent with the principles of res judicata as enunciated by both the Illinois and federal courts.

4. Petitioners' attempts to predict adverse consequences from applying res judicata to this case consist of (a) complaints that it will be more difficult to determine when a cause of action may legally be split, (b) an attack on the doctrine and purposes of res judicata and (c) matters not raised by the facts of this case.

a. If a party is aware of alternative theories for recovery, he should not speculate whether the cause of action can be divided between two courts. When a single forum is available for both theories, that forum should be selected initially or the additional theory waived. The risk of correctly speculating whether a state statute sufficiently "tracks" its federal counterpart and thus bars a second suit compels the joining of all claims into one lawsuit. That is the purpose of res judicata.

b. The other consequences predicted by petitioners result not just from application of res judicata in this case but occur

in all situations where a second lawsuit is barred by res judicata.

(i) Litigants whose lawyers do not initially focus on federal theories will be barred from pursing those claims if a state action arising out of the same set of facts has already been concluded. This has always followed when an attorney did not perceive alternative theories in the first suit. No exception to the doctrine of res judicata should be created to provide lawyers an opportunity to exercise their hindsight by starting over.

(ii) Some plaintiffs may be foreclosed from expeditiously litigating state claims if both state and federal theories must be litigated at once. However, this is just a different way of arguing that this court should reject the policies behind claim preclusion and embrace claim splitting. Occasionally, it might be quicker and more convenient for some plaintiffs to litigate one theory at a time, starting with the simplest, until they win. But the burden on the courts, and on the defendants who are dragged through successive lawsuits, outweighs such "convenience." Moreover, any serious problem of inconvenience resulting from the joinder of simple and complicated theories in one lawsuit can be handled by a motion to stay proceedings on some counts or a motion to sever.

(iii) To the extent that a claim is barred by a prior action, further private enforcement of any statute could be affected. Giving a plaintiff two or three bites at the apple would multiply enforcement actions. However, there is the overriding policy that litigation must at some point come to an end. By applying res judicata in this case, parties will understand that federal antitrust theories cannot be reserved and later brought only if their state court action fails. This will enhance private antitrust enforcement by requiring such actions to be brought immediately or waived.

(iv) As petitioners recognize, their position that antitrust enforcement will be curtailed conflicts with their argument that more lawsuits will be brought to the federal courts. Adherence to res judicata principles will force parties with federal claims to present them immediately. This, however, does not increase the number of actions before the federal courts. Petitioners advocate a right to be heard twice; once in state court and once in federal court. That does not reduce litigation in the federal courts. Res judicata limits their access to one forum. If the state court is chosen there can be no subsequent federal suit. This reduces the burden on the federal courts. If the federal court is initially selected, the state claims can be joined under pendent jurisdiction. These claims can be dismissed without prejudice to refiling in the state court if a federal claim cannot be sustained. Consequently, weak federal theories will not permanently remove substantial state questions from state to federal forums. The Seventh Circuit's application of res judicata in this case effectively balances the tension between strong antitrust enforcement and reduced federal caseload.

c. The petitioners' other points involve matters not raised by the facts of this case.

(i) It is argued that state court defendants will be required to raise by counterclaim antitrust theories they may have against the plaintiff or be barred. It is asserted that defendants will be coerced into giving up their right to pursue an action in federal court. The opinion below, however, distinguishes that situation and limits its application of res judicata to parties who were plaintiffs both in the state and federal suit. (App. A-8) A reversal of parties in the two suits might call for a different result, but that question is not present in this case and could not be considered here. *See, Magra* v. *Warren City School District Board of Education*, 79 L. Ed. 2d at 64 n. 7.

(ii) Finally, it is urged that the application of res judicata will hinder state enforcement because an action

brought by one agency in state court might preclude a different agency from pursing a federal claim. The unique problem of privity and res judicata relevant to governmental agencies is not an issue in this case as petitioners were private individuals and the parties were identical and similarly aligned in both state and federal suits.

However, the problems outlined by petitioners have and will always exist to some extent whether or not an exception to res judicata is created in this case. *See*, Comment, "Res Judicata and Intra-Governmental Inconsistencies," 49 Columbia L. Rev. 640 (1949). An agency pursuing a defendant in state court may create a bar to a subsequent federal action *for* another state entity. But an agency already creates a bar to other enforcement actions in state or federal court if the federal forum is selected initially. These are problems which involve internal state agency coordination and privity. Such problems do not justify abandoning res judicata and its worthy objectives. While the potential application of res judicata may reduce the number of suits that can be brought by a state against a defendant, that is the doctrine's purpose. Firm application of that doctrine will insure that actions are prosecuted in a coordinated and efficient manner.

5. Because res judicata bars this action, the discovery issue is not reached. Even if it is, the opinion below correctly found an abuse of discretion because the district court ignored the Academy's interests despite available means of protecting the interests of both parties. Because the controversy concerns application of an undisputed standard, resolution will not provide meaningful precedent.

6. The Seventh Circuit's ruling on the discovery issue does not prevent litigation of the case. Discovery was not denied. It could proceed subject to the three logical safeguards cited by the Court; *in camera* inspection of the sensitive documents, redaction of information identifying

the Academy members who commented, and deferring discovery of the sensitive Academy application files until completion of discovery on other, possibly dispositive issues.

The Academy had moved for a temporary stay of discovery of its application files, until the plaintiffs had an adequate opportunity to take the discovery they considered necessary to respond to a motion for summary judgment based on lack of antitrust injury in fact flowing from denial of Academy membership. The Academy's motion for stay was supported by the affidavit of its executive director, Dr. Heck. He testified to facts showing that non-membership in the Academy has no economic impact on an orthopaedist, that all the Academy's educational programs are open to members and non-members alike, and that both petitioners had attended and Dr. Treister had participated in past Academy programs. Petitioners failed to controvert his affidavit. The reviewing court was entitled to consider the uncontroverted evidence in the record about the Academy in deciding that the district court erroneously failed to adopt any of the available alternatives for protecting the membership application process.

The Academy's requested sequence of discovery—focusing first on the nature of Academy and the consequences of non-membership—would not involve discovery of the application files or the reasons for rejecting petitioners' applications. To focus discovery on one potentially dispositive issue raised by the Academy and supported by unanswered testimony would have neither delayed proceedings in the trial court nor added to the expense of the litigation. To the contrary, it would have potentially shortened the lawsuit, saved litigation expense associated with discovery on all other issues, and preserved the confidentiality of the Academy's membership application process.

7. The Seventh Circuit correctly concluded that important social values are at stake when discovery is used in a way that will change how a voluntary association selects new members. The impact of disclosure of membership

deliberations on the Academy required a more careful balancing of interests than the district court performed.

This case is a simple membership dispute. On the one side, the Academy and its members have a long-established procedure for evaluating applicants and selecting new members. Following that procedure, it decided not to elect the petitioners. On the other side, petitioners Marrese and Treister would like to be members.

When the trial court considered the interests at stake to decide the motion to temporarily stay discovery of the Academy's membership files, it should have recognized that the confidentiality of the membership process in a voluntary association of individuals is imbued with societal interests that transcend the Academy, or any other voluntary association. Whether considered under the rhetoric of a First Amendment interest associated with the recognized freedom of association, or simply as an important social interest in preserving the voluntary aspect of many membership associations, the Seventh Circuit determined that the district court had failed to properly recognize and weigh those interests in the balancing test. No new First Amendment interest was created, and professionals were not singled out for any special benefits.

Petitioners' interests are, in themselves, wholly private; each wants to be a member of the Academy, a goal in which society has no interest. Only by cloaking their personal wishes with the mantle of "antitrust enforcement" may petitioners, too, invoke societal interests which might justify forced disclosure through discovery in litigation. The petitioners' claim to societal interests in antitrust enforcement hinges on whether they have a genuine antitrust claim. As in the court's prior panel opinions, the error of the district court's balancing could be explained by the questionable merit of the plaintiffs' antitrust theory.

But unlike the prior opinions of the Seventh Circuit panel, the *en banc* decision of the court did not turn on the doubtful merit of the petitioners' underlying antitrust claim. Rather, even accepting the petitioners' antitrust theories as meritorious and therefore according petitioners the benefit of societal interests (*e.g.*, antitrust enforcement) in the discovery that

they invoke, the availability of several safeguards that were discounted or ignored by the district court demonstrated that the trial judge failed to properly perform the requisite balancing test.

6. Review by this Court will not provide useful precedent for resolution of discovery controversies.

Both the majority and the dissent agree upon the applicable legal standard, the balancing test (App. A-17; A-37-A38). The dissenting judges agree that the district court could have handled the discovery issue better (App. A-38). The majority concluded that, upon the then existing record in this case, the trial judge's discovery order was clearly erroneous. The dissent disagreed that the district court's perceived shortcomings constitute reversible error.

Whether this court were to agree with the majority or with the dissent below on this discovery issue, neither result would assist courts in applying the balancing test to the particular facts of other cases.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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APPENDIX

78 Ill.App.3d 746
396 N.E.2d 1225

**Michael R. TREISTER, M.D.,
Plaintiff-Appellee,**

v.

**AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,
Defendant-Appellant.**

No. 77-1221.

Appellate Court of Illinois,
First District, Third Division.

Oct. 31, 1979.

(Majority Opinion)

McGILLICUDDY, Justice:

On November 3, 1976, the plaintiff, Michael R. Treister, M.D., filed a three-count complaint against the defendant, American Academy of Orthopaedic Surgeons, challenging the academy's denial of his initial application for membership in the academy. The academy filed a motion to dismiss plaintiff's complaint on various grounds which included the failure to state a cause of action because the decision of a private professional association rejecting an application for membership is not subject to judicial review. The plaintiff filed a motion to strike the motion to dismiss. On January 24, 1977, the trial court denied the academy's motion to dismiss count I, but granted the motion to dismiss counts II and III.

On January 31, 1977, the plaintiff filed a motion for compelled discovery of all records and correspondence pertaining to Michael R. Treister. The academy responded with a motion to limit discovery. In its motion the academy contended that discovery should be limited to a determination of the threshold issue as to whether there exists a justiciable matter. In addition, the academy claimed that the plaintiff's application file and the investigative activities contained therein are privileged and confidential and not subject to discovery. On February 18, 1977, after an *in camera* inspection, the trial court entered an order directing the academy to produce the plaintiff's application file.

Subsequently, the plaintiff filed a motion for default judgment stating that the academy refused to produce the application file. The academy filed a motion for summary judgment, a motion to vacate the discovery order of February 18, 1977, on constitutional grounds, and a petition for certification of legal issues for interlocutory appeal. The trial court entered an order denying the three motions. The court granted, in

part, the academy's petition for certification but reserved its ruling on the specific orders and issues to be certified.

On August 8, 1977, the court certified the following questions:

"1. Order of January 24, 1977 sustaining Count One of the Complaint and striking Counts Two and Three of plaintiff's complaint. Question: Does plaintiff's complaint state a cause of action, and if so, in which counts?

"2. Order of February 18, 1977 granting plaintiff's Motion for compelled discovery and denying defendant's motion for protective order and the order of May 24, 1977 denying defendant's motion to vacate and denying plaintiff's motion for sanctions. Issue: Is the order compelling discovery a proper order?"

The case comes before this court as a permissive interlocutory appeal pursuant to Supreme Court Rule 308. Ill.Rev.Stat., 1977, ch. 110A, par. 308.

Count I of the complaint states that the plaintiff is an orthopaedic surgeon licensed to practice medicine and surgery in the State of Illinois and has been certified by the American Board of Orthopaedic Surgery. The plaintiff is a member of numerous professional associations, holds several teaching positions, is the author of numerous papers relating to the field of medicine and is a member of the attending staff of seven Chicago hospitals.

The plaintiff asserts that the American Academy of Orthopaedic Surgeons, a not-for-profit corporation, admits board-certified orthopaedic surgeons to fellowship and membership in the academy on the basis of standards and rules adopted by the academy and published in their by-laws. The plaintiff claims that active fellowship in the academy is a factor relied upon by hospitals in the granting of orthopaedic surgical privileges, by insurance companies in the establishment of malpractice rates, by courts in determining the expertise of an orthopaedic surgeon whose testimony is offered as expert and by young physicians selecting a clinic in which to practice. The plaintiff characterizes membership in the academy as "a practical necessity for an orthopaedic surgeon who wishes to realize maximum potential achievement and recognition in his specialty."

In November 1974 the plaintiff applied for membership in the academy by submitting an application form. According to the plaintiff, the academy prepared a list of applicants for active fellowship and broadly distributed it to physicians throughout the United States together with a request for information concerning the reputation and qualifications of the persons named thereon.

In 1976 the plaintiff was interviewed by Dr. Louis Kolb, who informed him that there was adverse information in the plaintiff's file. Dr. Kolb predicted that this information would result in the rejection of his application. Although Dr. Kolb informed the plaintiff of the general nature of the charges, the plaintiff asserts that Dr. Kolb did not provide sufficient detail to enable him to rebut the charges. When the plaintiff requested that Dr. Kolb permit him to examine the file, the doctor replied that academy regulations forbade such an examination. Dr. Kolb also denied the plaintiff's request that he further specify the nature of the charges and that he identify the persons making the charges. In addition, Dr. Kolb refused to cite any authority for denying the plaintiff's request to see his file and to be informed of the charges and the identity of his accusers.

The plaintiff states that, at the suggestion of Dr. Kolb, he wrote a letter to the academy attempting to rebut the charges as well as possible under the circumstances and requesting all available appeal rights and the right to be represented by counsel. The plaintiff received no communication from the academy until October 1976 when he received a letter notifying him that his application had been rejected, that the matter was closed and that he could not reapply for admission for three years.

The plaintiff claims that the procedures followed by the academy in rejecting his application violate the academy's by-laws. The by-laws require the regional admissions

committee to "conduct a personal interview with the applicant," but the plaintiff was interviewed solely by Dr. Kolb. The by-laws require that the committee "shall make all necessary investigation to verify the credentials of the applicant and determine his qualifications." The plaintiff claims the investigation was insufficient to determine his qualifications because he was not given a fair opportunity to present his case or rebut the charges against him. In addition, the by-laws require every member to abide by the principles of the American Medical Association, one of which states that:

> "The basic principles of a fair and objective hearing should always be accorded the physician whose professional conduct is being reviewed. These basic guarantees are: a specific charge, adequate notice of hearing, the opportunity to be present and to hear the evidence, and to present a defense. . . . These principles of fair play apply in all disciplinary hearings and in any other type of hearing in which the physician may be deprived of valuable rights. Whenever physicians sit in judgment on physicians and whenever that judgment affects a physician's reputation, professional status or livelihood, these principles of fair play must be observed. . . ."

The plaintiff charges that these principles were violated because he was not informed of any specific charge, was given no notice or opportunity to be present when his application was to be considered and was not allowed to hear the evidence against him nor to present a defense.

Finally, the plaintiff maintains in his complaint that the by-laws set forth the following conditions precedent to active fellowship:

1. Active fellowship shall be limited to those individuals who are certified by the American Board of Orthopaedic Surgery and whose medical practice is devoted exclusive to orthopaedic surgery . . .

2. Active fellows must either be citizens of or in practice in the United States or Canada.

3. Active fellows must be certified by the American Board of Orthopaedic Surgery and must have engaged in the exclusive practice of orthopaedic surgery for a minimum period of three (3) years subsequent to the completion of their period of training.

4. Each applicant must submit an application to the secretary of the academy on forms provided by the academy and the application must be endorsed by two (2) active fellows, or by one (1) active fellow and one (1) emeritus fellow.

5. Election to active fellowship shall be by two-thirds vote of the board of directors.

6. Active fellowship is contingent upon continuing compliance with the articles of incorporation and the by-laws of the corporation.

7. No person shall be elected or remain a fellow of the academy unless he is of good moral character and adheres to the principles of medical ethics of the American Medical Association.

The plaintiff claims that he meets every requirement for active fellowship except for election by two-thirds of the board of directors. The plaintiff, therefore, concludes that the procedure followed by the academy in rejecting his application was fundamentally unfair and that the rejection is void as a matter of common law.

In his prayer for relief the plaintiff asks for a declaration that he is entitled to be informed of any charges against him; to be informed of the identity of his accusers; to have a fair hearing before an impartial adjudicator, and to have conclusions of fact fairly supported by evidence of record. In addition, the plaintiff asks for a declaration that the rejection of his application was void.

Count II of the plaintiff's complaint realleges the allegations contained in count I and further states that "[B]ecause of the relationship between the academy, the American Medical Association, the hospitals of the State of Illinois, and the State of Illinois itself, rejection of Plaintiff's appli-

cation is State action." The plaintiff claims, therefore, that the procedure followed by the academy deprived him of his liberty or property without due process of law and seeks the same relief prayed for in count I.

In count III the plaintiff alleges that the academy breached the contract established by the plaintiff's application for membership. The application contained the following provision:

". . . It is further specifically agreed by the undersigned, that in consideration of the Academy's treatment of the entire contents of this application, as well as all inquiries or investigations made pursuant thereto as privileged and confidential material, and not subject to publication or public dissemination whether voluntary, involuntary or by operation of law, that the undersigned specifically authorizes the Academy to make whatever inquiries and investigation it deems necessary to verify the credentials, professional standing and moral or ethical character of the undersigned . . . ."

The plaintiff claims that the academy breached this agreement and disclosed part of the contents of his application by preparing a list of applicants and broadly distributing the list to physicians throughout the United States. The plaintiff maintains that neither the designation of himself as an applicant nor the distribution of the list was reasonably necessary for the solicitation of information concerning his qualifications or authorized at any time. He contends this constituted a breach of the contractual obligation to guard the confidentiality of his application. The plaintiff asserts that the distribution of the list was not intended to solicit information concerning his qualifications but rather to enhance the power of the academy and, in conjunction with the later publication of a roster of members, to enable the medical community to ascertain what physicians were denied membership. The plaintiff claims that publication of a roster of members will inform the orthopaedic community of his rejection and will impair his professional reputation and financial situation. The plaintiff seeks an injunction forbidding the publication of the roster of members excluding his name and judgment in the amount of $10,000,000.

I

The academy argues that the trial court lacked jurisdiction of matters alleged in count I and maintains that the traditional rule is that judicial review is not available to examine a decision by a private professional association to reject an application for initial membership. (See, Annot., 89 A.L.R.2d 964, 971 (1963).) The plaintiff contends that in recent years courts have decided that an applicant to professional associations has a right to a fair hearing on his application and to reasonable standards for admission. Because the reviewing courts in Illinois have not considered this issue, we will review decisions of other jurisdictions for assistance in the resolution of this issue.

In 1961 the Supreme Court of New Jersey decided *Falcone v. Middlesex County Medical Society*, 34 N.J. 582, 170 A.2d 791, wherein it affirmed an order of the trial court directing the Middlesex County Medical Society to admit the plaintiff to full membership. The society's rejection of the plaintiff's application was based on an unwritten membership requirement which the court characterized as patently arbitrary and unreasonable.

In *Falcone*, the evidence revealed that the local hospitals required all their staff physicians to be members of the society, and that the society's refusal to admit the plaintiff to membership had serious adverse economic and professional effects on him. The court, in arriving at its decision to permit judicial review as a matter of policy, stated:

"When courts originally declined to scrutinize admission practices of membership associations they were dealing with social clubs, religious organizations and fraternal associations. Here the policies against judicial intervention were strong and there were no significant countervailing policies. When the courts were later called upon to deal with trade and professional associations exercising virtually monopolistic control, different factors were involved. The intimate personal relationships which pervaded the social, religious and fraternal organizations were hardly in evidence and the individual's opportunity of earning a livelihood and serving society in his chosen trade or profession appeared as the controlling policy consideration. Here there have been persuasive indications . . . that in a case presenting sufficiently compelling factual and policy considerations, judicial relief will be available to compel admission to membership. . . ."

Undoubtedly, the court's decision was influenced by the society's virtual monopoly over the use of local hospital facilities and the fact that the plaintiff could not successfully continue his practice of surgery and obstetrics without the use of these facilities.

In *Salter v. New York State Psychological Association* (1964), 14 N.Y.2d 100, 248 N.Y.S.2d 667, 198 N.E.2d 250, the plaintiff, a practicing psychologist, sought a court order to admit him to the association because membership is "a tangible thing of value" to any psychologist. The association responded that the plaintiff failed to meet the educational requirement which is a condition of membership. The New York Court of Appeals interpreted *Falcone* as requiring a showing of "economic necessity" before courts will interfere with the affairs of a private association. In refusing to grant relief to the plaintiff in *Salter*, the court noted that the record revealed no monopoly power over the profession or an arbitrary or unreasonable refusal to grant membership.

The Arizona Supreme Court in *Blende v. Maricopa County Medical Society* (1964), 96 Ariz. 240, 393 P.2d 926, held that the plaintiff's membership application to the society could not be denied arbitrarily if the denial would deprive the plaintiff of hospital staff privileges. The court stated:

"We agree with the reasoning in the Falcone decision. The interests in freedom of association and in autonomy for private associations make it desirable to allow private groups to determine their own membership. But when a medical society controls a doctor's access to hospital facilities, then the society's exercise of a quasigovernmental power is the legitimate object of judicial concern."

However, in remanding the case to the trial court for hearing, the Supreme Court advised that if it should determine that the society refused membership on the basis of factual findings supported by substantial evidence and reached through the application of a reasonable standard—one which comports with the legitimate goals of the society and the rights of the individual and the public—then judicial inquiry should end.

In *Frasker v. Pacific Coast Society of Orthodontists* (1969), 1 Cal.3d 160, 81 Cal. Rptr. 622, 460 P.2d 466, the plaintiff argued that exclusion from several dental organizations would deprive him of educational, financial and professional advantages. The California Supreme Court held that an applicant for membership has a judicially enforceable right to have his application considered in a manner comporting with the fundamentals of due process, including the showing of cause for rejection. The court stated:

"Because of the unique position in the field of orthodontics occupied by defendant AAO and its constituent organizations, membership therein, although not economically necessary in the strict sense of the word (as was the case in *Falcone*), would appear to be a practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and recognition in such specialty."

The case was remanded to the trial court to permit the defendants to demonstrate the action taken on the plaintiff's application complied with the minimal requisites of a fair procedure required by common law principles.

On remand the defendants presented their reason for denying membership to the plaintiff. However, the plaintiff was not

permitted to respond to the charges. The case again reached the State Supreme Court wherein it held that whenever a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair. (*Pinsker v. Pacific Coast Society of Orthodontists* (1974), 12 Cal.3d 541, 116 Cal.Rptr. 245, 526 P.2d 253.) The court also declared that "fair procedure" requires that before denial of the application, the applicant must be notified of the reason for the proposed rejection and given a fair opportunity to defend himself.

The plaintiff herein argues that Illinois courts have explicitly approved the modern rule set forth in *Falcone* and *Pinsker* which demands fair procedures and reasonable standards in the processing of membership applications of private associations. The plaintiff discusses two decisions which discuss the expulsion of a member from a private association. In *Virgin v. American College of Surgeons* (1968), 42 Ill.App.2d 352, 192 N.E.2d 414, the court stated:

> "Whether the 'interest of substance' which accrues to a member of a professional association is called a 'property right,' 'contract right' or merely the 'member's relation to the association,' there is a growing awareness that wrongful expulsion from a voluntary professional association has such a serious effect on the ability of the professional man to successfully pursue his livelihood and that it is a judicially protectable interest. [Citations.]
>
> "Courts annul expulsions from voluntary associations when they are (1) not in accordance with the constitution and by-laws of the association, (2) influenced by bias, prejudice or lacking in good faith, or (3) contrary to rudimentary due process or natural justice."

In *Van Daele v. Vinci* (1972), 51 Ill.2d 389, 282 N.E.2d 728, *cert. denied* 409 U.S. 1007, 93 S.Ct. 438, 34 L.Ed.2d 300, the court specified that one subjected to expulsion from a voluntary association should be afforded a hearing before a fair and impartial tribunal.

The plaintiff asserts that because Illinois courts recognize no distinction between expulsion and exclusion, the law in those cases dealing with expulsion is applicable to cases involving the exclusion of an applicant from a private association.

We disagree with the plaintiff's contention that Illinois courts use the words "expulsion" and "exclusion" interchangeably. A review of the decisions concerning the expulsion or exclusion of a doctor from a private hospital's staff supports our position. Although Illinois courts will require a hospital to follow its by-laws in revoking a physician's staff privileges (*Nagib v. St. Therese Hospital, Inc.* (1976), 41 Ill.App.3d 970, 355 N.E.2d 211), they will not review the denial of an application for appointment to the medical staff. *Jain v. Northwest Community Hospital* (1978) 67 Ill.App.3d 420, 24 Ill.Dec. 341, 385 N.E.2d 108; *Mauer v. Highland Park Hosp. Foundation* (1967), 90 Ill.App.2d 409, 232 N.E.2d 776.

In determining whether we should permit judicial review of the denial of the plaintiff's membership application, we must weigh the importance of two values which are in conflict in this situation. On the one hand, we recognize the necessity of judicial restraint from interfering with or regulating the affairs and decisions of a private, voluntary association. However, we also find it unconscionable that a private association could deprive an individual of the right to pursue his or her profession because of a personality conflict, his or her race or religion, or, as the plaintiff suggests in his brief, testimony on behalf of plaintiffs in malpractice actions.

[1, 2] Balancing these two interests, we hold that our courts can review the application procedures of a private association when membership in the organization is an economic necessity. We approve of the opinions in *Falcone* and *Blende* which hold that a medical society cannot arbitrarily deny membership to an applicant when the society controls access to local hospital facilities and thus can deprive the applicant of his ability to practice medicine.

[3] We find, however, that the plaintiff has not alleged that membership in the American Academy of Orthopaedic Surgeons is an economic necessity. Membership is not a requisite to hospital staff privileges as evidenced by the fact that the plaintiff is a member of the attending staff at seven Chicago hospitals. In addition, the plaintiff was board-certified and licensed by the State without academy membership.

The plaintiff's complaint alleges that membership in the academy is a "practical necessity . . . to realize maximum potential achievement and recognition in [his] specialty," language used by the California Supreme Court in *Pinsker*. We refrain from following *Pinsker*, however, because such a holding would result in complaints for judicial review of every application rejection by a voluntary association since membership in most organizations results in some professional or economic benefits. (*See Blatt v. University of Southern California* (1970), 5 Cal.App.3d 955, 85 Cal.Rptr. 601—plaintiff sought to compel membership in the Order of the Coif, a national honorary legal society.) An examination of court opinions rendered subsequent to *Pinsker* reveals the extent to which California courts have reviewed the admission procedures of private organizations. (*Marin County Bd. of Realtors v. Palmer* (1976), 16 Cal.3d 920, 130 Cal.Rptr. 1, 549 P.2d 833—review of exclusion from association of real estate brokers; *Anderman v. St. Francis Memorial Hosp.* (1975), 45 Cal.App.3d 907, 119 Cal.Rptr. 507—review of exclusion from hospital staff despite the fact that the physician enjoyed full staff privileges at four other hospitals and made no showing of a significant injury to his medical practice.)

Although in this case we sympathize with the plaintiff's frustration with the academy's refusal to give him the courtesy of an explanation of the denial of his application, we believe the courts must refrain from interfering in the affairs of a private association absent a showing of economic necessity.

[4] The plaintiff also asserts in count I that he has a right to have his application considered according to the by-laws of the academy. Although our courts will require an association to follow its by-laws in expelling a member (*Virgin v. American College of Surgeons*), we find no Illinois case law which permits a non-member to seek judicial enforcement of an association's by-laws.

In addition, the plaintiff argues that he has a contractual right to have his application considered according to the by-laws. The plaintiff relies on a provision in his application which states:

> "The undersigned agrees that he will comply with each and every provision of the by-laws of the American Academy of Orthopaedic Surgeons and any duly adopted rules and regulations pursuant thereto; and that he will comply with the Principles of Medical Ethics of the American Medical Association."

The plaintiff argues that because he is required to abide by the by-laws, it is implicit in this provision that the academy must obey the by-laws as well.

This provision, however, binds the plaintiff to comply with the academy's by-laws in the future should his application for membership be accepted. The provision places no duty upon the academy to employ certain criteria in evaluating applications for membership.

For the foregoing reasons, we hold that count I of the plaintiff's complaint states no cause of action.

II

The trial court dismissed for failure to state a cause of action count II of the complaint which alleged that the procedure followed by the academy deprived the plaintiff of his liberty or property without due process of law. Count II realleged the allegations contained in count I and added the following paragraph:

> "Because of the relationship between the academy, the American Medical Association, the hospitals of the State of Illinois, and the State of Illinois itself, rejection of Plaintiff's application is State action."

The plaintiff claims that the question of State action is one of fact which should rarely be decided on a motion to dismiss. The academy labels this count "wholly conclusory" and states that the count alleges no facts which would establish State action.

[5, 6] Our Civil Practice Act states that pleadings are to be liberally construed with a view to doing substantial justice between the parties. (Ill.Rev.Stat., 1975, ch. 110, par. 33.) Therefore, when a trial court rules on a motion to dismiss a complaint for failure to state a cause of action, all facts properly pleaded and all reasonable inferences therefrom must be taken as true. (*Newby v. Board of Educ.* (1977), 53 Ill. App.3d 635, 11 Ill.Dec. 560, 368 N.E.2d 1306.) However, a complaint which does not allege sufficient facts to demonstrate a cause of action may not be remedied by liberal construction. (*First National Bank v. City of Aurora* (1978), 71 Ill.3d 1, 15 Ill.Dec. 642, 373 N.E.2d 1326; *Founding Church of Scientology v. American Medical Ass'n* (1978), 60 Ill.App.3d 586, 18 Ill.Dec. 5, 377 N.E.2d 158.) The complaint may not rest upon conclusions of fact unsupported by allegations of specific facts from which such conclusions may be drawn. *Henkhaus v. Barton* (1977), 56 Ill.App.3d 767, 14 Ill. Dec. 113, 371 N.E.2d 1166.

[7] The plaintiff asserts that because of the relationship between the academy, the American Medical Association, the hospitals of this State, and the State itself, his rejection from the academy is State action. This statement is merely a conclusion unsupported by any allegations of fact. The plaintiff makes no attempt to explain the relationship which would support a conclusion of State action. Absent sufficient factual allegations, the plaintiff's conclusory charge of State action is insufficient to withstand a motion to dismiss. The trial court properly dismissed count II of the plaintiff's complaint.

[8] The academy also argues that the propriety of the trial court's order dismissing counts II and III is not properly before this court pursuant to Supreme Court Rule 308. It states that neither its petition for certification of legal issues for interlocutory appeal filed in the trial court nor its application for leave to appeal on file with this court requested certification of the issues raised by the trial court's dismissal of counts II and III.

Rule 308(a) provides that:

"When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order."

This rule specifically permits the trial court to certify an order on its own motion. The trial court's order of certification explicitly requested that this court determine if the complaint stated a cause of action and, if so, in which counts. In our opinion the sufficiency of counts II and III is clearly before this court.

III

[9] The trial court also dismissed for failure to state a cause of action count III of the complaint which alleged that the academy breached the contract established by the plaintiff's application for membership. That provision stated that in consideration of the academy's treatment of the contents of the application as well as all inquiries or investigations made pursuant thereto as privileged and confidential, the applicant authorized the academy "to make whatever inquiries and investigations it deems necessary to verify the credentials, professional standing and moral or ethical character of the undersigned." [Emphasis added.] The plaintiff alleges that the academy breached this contract by distributing a list of applicants to physicians throughout the United States.

As a matter of law, we find that the plaintiff has alleged no facts to support his claim of breach of contract which would withstand a motion to dismiss. The academy's circulation of the list of applicants to its members definitely is a reasonable means of investigation which the plaintiff authorized in the application. Disclosure of the name of an applicant is clearly contemplated by the terms of the agreement, and it is inherent in the very notion of applying for membership in any selective organization. We agree with the trial court that count III of the plaintiff's complaint does not state a cause of action.

Because we have determined that the plaintiff's complaint does not state a cause of action, it is unnecessary for us to consider whether the order compelling discovery was a proper order.

For the foregoing reasons, that portion of the order of the Circuit Court of Cook County sustaining count I of the plaintiff's complaint is reversed and count I is dismissed; that portion of the order of the Circuit Court of Cook County dismissing counts II and III is affirmed.

Affirmed in part; reversed in part.

(Dissent appears in petitioners' appendix at pp. S-1—S-37)

REPLY

BRIEF

No. 83-1452

Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

R. ANTHONY MARRESE and MICHAEL R. TREISTER,
Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,
Respondent.

JOINT REPLY TO THE BRIEF OF THE AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS IN OPPOSITION TO THE JOINT PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

R. ANTHONY MARRESE and MICHAEL R. TREISTER,
Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,
Respondent.

JOINT REPLY TO THE BRIEF OF THE AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS IN OPPOSITION TO THE JOINT PETITION FOR A WRIT OF CERTIORARI

The respondent's brief in opposition ("Opposition") to the joint petition ("Petition") is a weak attempt to justify the Seventh Circuit's unprecedented in banc decision. The reason for the respondent's initial reluctance to file a response is evident from the positions it has adopted. The principal new arguments made by the respondent are considered below.

I. ILLINOIS' CLAIM PRECLUSION LAW REFUTES THE RESPONDENT'S UNHEARD-OF ASSERTION THAT, UNDER SUCH LAW, CLAIMS THAT COULD NOT HAVE BEEN RAISED IN THE COURT OF FIRST FILING BECAUSE OF ITS LACK OF SUBJECT MATTER JURISDICTION OVER THEM MAY BE BARRED BY THAT COURT'S JUDGMENT.

The respondent attempts to defend the Plurality Opinion on the claim preclusion issues by arguing about the specific requirements of the Full Faith and Credit Act (28 U.S.C. § 1738), as interpreted in *Migra* v. *Warren City School District Board of Education*, ____ U.S. ____, 79 L.Ed.2d 56, 104 S.Ct.

892 (1984), and the specific requirements of Illinois' claim preclusion law. However, the Plurality Opinion held that Section 1738 was irrelevant and thus refused to consider those state law principles (Pet. 8-9). Hence, the respondent's illogical arguments only emphasize and compound the faulty logic of the initial assumptions of the plurality (id.).

Yet, the respondent asserts that the petitioners (as well as the dissenting Seventh Circuit Judges) have "completely reversed" and "twisted" the jurisdictional competency requirement of Illinois' claim preclusion law (Opp. 5-6). Because this canard might, if deserving of any credence, limit this Court's judgment of this case to a remand to the Seventh Circuit for its determination and application of that fundamental state law requirement, a brief review of the controlling Illinois cases is in order.

First, it is instructive to note that the respondent does not refer to the most recent Illinois Supreme Court case on point, *Spiller* v. *Continental Tube Co.* (1983), 95 Ill.2d 423, 447 N.E.2d 834, notwithstanding that *Spiller* was the only Illinois res judicata decision cited in the *amicus* brief of all the States of the Seventh Circuit (*Amicus* Brief, at p. 8). In *Spiller* the Illinois Supreme Court defined Illinois' res judicata doctrine as extending "not only to questions which were actually litigated but also to all questions which *could have been raised or determined*" (*Spiller* v. *Continental Tube Co.*, supra, 95 Ill.2d 432, 447 N.E.2d 838) (emphasis supplied). It did not say "could have been raised in any court anywhere, state or federal," although that is the construction which the respondent, by its argument, would necessarily have this Court apply to those words.

The obvious and correct interpretation of the prior jurisdictional competency/"could have been raised" requirement of Illinois' claim preclusion law is that the claim-preclusive effect of an Illinois court judgment is limited to those matters which "could have been raised" *in the court that*

ered such judgment. This mean: .g was assumed in *Spiller* only because the Illinois Supreme Court had repeatedly stated it explicitly in the past in, e.g., *Hughey* v. *Industrial Commission* (1979), 76 Ill.2d 577, 582, 394 N.E.2d 1164, 1166; *LaSalle National Bank* v. *County Board of School Trustees* (1975), 61 Ill.2d 524, 529-30, 337 N.E.2d 19, 22; and *Harvey* v. *Aurora & G. Ry. Co.* (1900), 186 Ill. 283, 294, 57 N.E. 857, 861. In turn, the Illinois Appellate Court recently specified the same meaning in, e.g., *Redfern* v. *Sullivan*, 443 N.E.2d 205, 208, 111 Ill.App.3d 372, 375 (1983); *Yaw* v. *Beeghly*, 440 N.E.2d 1066, 1069, 109 Ill.App.3d 627, 632-33 (1982); and *Kahler* v. *Don E. Williams Co.*, 375 N.E.2d 1034, 1036, 59 Ill.App.3d 716, 718 (1978). Indeed, *Hilti, Inc.* v. *Griffith*, 386 N.E.2d 63, 68 Ill.App.3d 528 (1978), one of the two Illinois Appellate Court cases miscited by the respondent for the proposition that the Illinois courts do *not* apply a similarity-of-evidence test in order to determine the identity of causes of action for res judicata purposes (Opp. 7; but *see Hilti, Inc.*, supra, at pp. 65-66 (N.E.2d)), itself confirmed Illinois' long-settled policy of limiting the claim-preclusive effect of its courts' judgments to those matters which "properly should have been litigated or might have been litigated *in the original action*" (id., at p. 65) (emphasis supplied).

Thus, as stated at page 11 of the Petition, "[t]here is no need for a remand for the lower courts' determination of the details" of Illinois' claim preclusion law. The basic jurisdictional competency requirement of that law, which has never been questioned by any Illinois court (Pet. 11), prevents the preclusion of these petitioners' exclusively federal antitrust claims.

It remains only to add that the respondent's contention that the petitioners have *agreed* that their previous state common law actions constitute the same cause of action as the present one (Opp. 4), is disproved by pages 17-18 of the Petition. The petitioners have consistently maintained, and

here continue to maintain, that their present exclusively federal antitrust action is an inherently different cause of action from those state court actions, both because the evidence needed to sustain this action would not have sustained the others (Pet. 17-18) and because of the crucial differences between their federal antitrust rights and the more limited rights which were potentially available to them under the Illinois Antitrust Act (Pet. 15, 19-20).

II. THIS COURT'S PRECEDENTS AND THE UNIFORM POSITION OF THE AMERICAN LAW INSTITUTE REFUTE THE RESPONDENT'S UNSUPPORTABLE CHARGE THAT THE PETITIONERS HAVE "TWISTED" AND "COMPLETELY REVERSED" THE FEDERAL COMMON LAW OF CLAIM PRECLUSION.

As with the corresponding requirement of Illinois' claim preclusion law (supra), the respondent urges that the "could have been raised" requirement of the federal common law of claim preclusion actually means "could have been raised somewhere else" (Opp. 4-6). In the absence of any authority for this startling textual exegesis, but in evident apprehension that this Court will agree with Justice Stewart's characterization of Judge Posner's first res judicata opinion in this case as "completely unprecedented," the respondent resorts to an evasive, muddled "policy" interpretation of this Court's recent approval of the "accepted principles of res judicata" in *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 398 (1981). The respondent also accuses the petitioners of having "completely reversed" the federal claim preclusion doctrine by reading the precedents in the same manner as both the First and Second *Restatement of Judgments* (Opp. 5).

The truth of the matter is revealed by *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948), and *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1877), the two controlling decisions of this Court which it cited in *Federated Department Stores* as

defining the federal common law doctrine of res judicata (*id.*, at p. 398). Those precedents defined that doctrine as follows:

> "The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'"
>
> (*Commissioner* v. *Sunnen*, supra, at p. 597, quoting *Cromwell* v. *County of Sac*, supra, at pp. 352-53) (emphasis supplied)

These repeated references by this Court to "admissible matter[s] which might have been offered for that purpose" cannot reasonably be said to have included "matters" which were not "admissible" in the prior proceeding, but only instead somewhere else and for some other purpose.

The respondent's contention that the Seventh Circuit's decision is the norm cannot be maintained in the face of these precedents, the *Restatements* (Pet. 12, 14), and the recent in banc decision of the Fifth Circuit in *Nilsen* v. *City of Moss Point, Miss.*, 701 F.2d 556, 564 (5th Cir. 1983) (Pet. 14). In the light of the respondent's heralded new understanding of the centuries-old "could have been raised" test, it is surprising that *Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981), the Seventh Circuit's only supposed precedent for its claim preclusion holding, did not likewise conclude that "could have been raised" means "could have been raised somewhere else." Instead, that decision mistakenly omitted the "could have been raised" requirement from its inadequate restatement of the "essential elements" of the res judicata doctrine (compare App. A-57-58 with Opp. 4).

III. THE RESPONDENT SEEKS TO EVADE THE THIRD AND FOURTH QUESTIONS PRESENTED FOR REVIEW BY ITS NOVEL CONTENTION THAT PARTIES WHICH BRING STATE COMMON LAW ACTIONS IN STATE COURT MUST "CORRECTLY SPECULATE" ABOUT THE DEGREE OF RELATIONSHIP BETWEEN STATE STATUTORY CLAIMS THAT MIGHT HAVE BEEN BROUGHT THERE AND OTHER, EXCLUSIVELY FEDERAL CLAIMS, ON PAIN OF FORFEITING THE LATTER IF THEY ARE FOUND TO "SUFFICIENTLY 'TRACK'" THE FORMER.

Instead of attempting to show that the plurality's reversion to the learned professions exemption is consistent with this Court's recent antitrust decisions and that its strange "tracking" technique achieves a legally acceptable level of certainty, the respondent argues that the extreme *uncertainty* of that technique is a risk that all state court litigants must bear. In this case, for example, the respondent contends that, regardless of how inadequate the petitioners' previously available Illinois antitrust remedies may have been as a substitute for their federal antitrust remedies, the risk of "correctly speculating" about the degree of equivalence that the plurality eventually found, "compel[led] the joining of all claims into one lawsuit" in federal court (Opp. 8). Indeed, although the plurality felt compelled to find the Illinois remedies to be a "perfect substitute" for the federal ones (App. A-11), the respondent now implies that no such complete equivalence was necessary. It is enough, according to the respondent's circular logic, if a state statute "sufficiently 'tracks' its federal counterpart" (Opp. 8).

No precedent is cited for this remarkable proposition that parties who bring state law claims in their natural forum must be forced to "speculate" about the possible preclusion of

exclusively federal claims. *Nash*, supra, and *Dertsh*[1] at least did not remit the parties and the courts to such unrestrained "speculation," and even the Plurality Opinion professed to avoid it in reaching its memorable conclusion that the petitioners' Illinois antitrust remedies

> "* * * would have been a perfect substitute for a federal antitrust suit—even if the Illinois Act had contained no damages provision at all" (App. A-11).

IV. IF THE MAJORITY'S FIRST AMENDMENT HOLDING WAS UNNECESSARY, AS THE RESPONDENT NOW IMPLIES, THEN IT MUST BE ADDED TO THE OTHER ADMITTED REASONS FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION AS DESCRIBED IN THE SEVENTH QUESTION PRESENTED, BECAUSE THE FEDERAL COURTS ARE FORBIDDEN TO RENDER UNNECESSARY CONSTITUTIONAL OPINIONS.

It is settled law, beyond need of citation, that the federal courts may only reach constitutional issues when and to the minimum extent necessary. Thus, the respondent's deprecating reference to the "rhetoric" of a "First Amendment interest associated with the recognized freedom of association" (Opp. 13) suggests still another reason for this Court to review the Seventh Circuit's decision. This attempt to evade the Fifth Question Presented suggests that the Seventh Circuit has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision" (Supreme Court Rule 17(1) (a)).

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[1] *Dertsh v. San Mateo-Burlingame Bd. of Realtors*, 1984-1 Trade Cas. ¶ 65,771 (9th Cir. 1983).

V. THE MAJORITY'S "MISTAKE" STANDARD FOR THE REVIEW OF DISCOVERY ORDERS IS CONTRARY TO ALL PRECEDENT, DESPITE THE RESPONDENT'S EFFORTS TO CONFUSE THAT STANDARD WITH THE BALANCING TEST.

Contrary to the respondent's position that the Seventh Circuit has adopted an "undisputed standard" of appellate review of discovery orders (Opp. 11), the majority opinion has created a conflict between the Seventh and Eighth Circuits, has misstated the standard of review endorsed by Justice Stewart and has misinterpreted the standard of review adopted by the Tenth Circuit.

The Seventh Circuit's "firm conviction of mistake" standard of judicial review of discovery orders is incalculably less stringent than the "gross abuse of discretion resulting in fundamental unfairness" test adopted by the Eighth Circuit in *Voegeli* v. *Lewis*, 586 F.2d 89, 96 (8th Cir. 1977), the "abuse of discretion" test of the Tenth Circuit, as reflected in *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 436 (10th Cir. 1977), and the "no reasonable person can agree" test previously applied to all discretionary orders in the Seventh Circuit (*Harrington* v. *DeVito*, 656 F.2d 264, 269 (7th Cir. 1981)). Indeed, it is an invitation to chaos: a standard which will permit any two reviewing court judges who happen to disagree with the manner in which a district judge is controlling discovery to intervene in the discovery process.

The origins of this intrusion of the "clearly erroneous" test of FRCP 52(a) into the review of discovery orders are apparent from a comparison of the three successive Seventh Circuit decisions. In the first panel decision, the Seventh Circuit adopted the "abuse of discretion" standard set forth in *Silkwood* v. *Kerr-McGee Corp.*, supra (App. B-5). However, in its second decision, the Court improperly cited *Silkwood* for the new standard of whether the reviewing court has a "firm conviction that the district judge has made a mistake" (App. C-5). Thereafter, in the in banc decision, the majority, unable to find any support for its unprecedented expansion of the scope of judicial review of discovery orders, relied upon Justice Stewart's supposed agreement with the "mistake" test in the (vacated) second decision (App. A-16-17). It thus completely ignored the language immediately preceding Justice Stewart's reference to this test, in his second dissent, which clearly established that he not only favored granting district judges broad discretion in conducting pretrial discovery, but also specifically favored the "gross abuse of discretion" standard adopted by the Eighth Circuit in *Voegeli* v. *Lewis* for these especially discretionary orders (App. C-14; compare App. B-21 and Justice Stewart's incorporation by reference of the entire discovery portion of his first dissent into his second dissent). In context, Justice Stewart's reference to the majority's new "mistake" test in the second panel decision was clearly meant to emphasize that, *even under the majority's suddenly revised standard*, its result could not be justified.

Finally, by its various references to the balancing test (Opp. 13-14), the respondent attempts to confuse the issue of the factors to be taken into account by a district court with that of the proper extent, if any, of the appellate court's independent weighing of those factors. There can be no dispute that District Judge Shadur engaged in a careful balancing of the relevant factors in arriving at his discovery orders (App. B-22). There remains great dispute, however, as to the propriety of the Seventh Circuit's substituting its own opinion for that judicious exercise of discretion.

VI. THE RESPONDENT'S TACIT ADMISSIONS OF EXTRAORDINARY IRREGULARITIES IN THE SEVENTH CIRCUIT'S DECISION CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The respondent has not denied any of the particulars of the Seventh Question Presented or attempted to dispute the basic principle of federal appellate practice (and FRCP 26(c) and

(d)) cited by the petitioners as opposing the Seventh Circuit's reversal of the District Court's discovery and contempt orders on the basis of arguments that were never made to that court. Instead, the respondent now emphasizes the only argument that it did make against the required discovery, apart from its "less than specious" (App. N-3) constitutional interpretations: its motion for a limitation of discovery to the issue of "injury in fact" (App. P). The reasons that this motion was denied in the District Court and not even mentioned in the Court of Appeals were aptly described in the District Court's memorandum and order of April 7, 1981 (see App. L-10-12, esp. at n. 3). The tainted affidavit of the respondent's Executive Director consisted entirely of his self-serving opinion, did not deal with the costs of exclusion and was offered on behalf of a party that had refused to move for summary judgment and was suspiciously reluctant to take either petitioner's deposition on the injury issue.

CONCLUSION

This major in banc decision should not escape this Court's review because of the sheer extent of its errors. Nor should its enormously important antitrust and discovery aspects escape review merely because the entire decision might fall with its reversal upon any of the first three Questions Presented. Accordingly, these petitioners respectfully seek this Court's guidance to the Seventh Circuit as to all the Questions Presented, other than the Fifth Question (if this Court need not decide it), and again pray for this Court's justice and review.

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AMICUS CURIAE

BRIEF

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In The

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October Term, 1983

R. ANTHONY MARREse and MICHAEL R. TREISTER,

Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE AMICI STATES OF THE SEVENTH CIRCUIT, ILLINOIS, INDIANA, AND WISCONSIN, ON BEHALF OF THE PETITIONERS

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QUESTIONS PRESENTED

In an exclusively federal action, may a federal court of appeals ignore the mandates of 28 U.S.C. 1738 and *Migra v. Warren City School District Board of Education*, ... U.S. ....., 104 S.Ct. 892 (1984), and give a state court judgment greater preclusive effect in a federal action than it would have in the rendering states.

May a judgment in a state court action, based on state constitutional and contractual claims, bar an exclusively federal antitrust action.

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In The

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v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,
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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF OF THE AMICI STATES OF THE SEVENTH CIRCUIT, ILLINOIS, INDIANA, AND WISCONSIN, ON BEHALF OF THE PETITIONERS

IDENTITY AND INTEREST OF THE AMICI CURIAE

The States of the Seventh Circuit Court of Appeals, Illinois, Indiana, and Wisconsin, respectfully submit this brief *amici curiae* in support of the Petitioners on Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Attorneys General of the *Amici* States are the chief law enforcement officials of their respective states. Because of their role, these Attorneys General are greatly interested in the correct application of the laws of the United States, and the decisions of both this Court and the Seventh Circuit Court of Appeals. Since the Seventh Circuit's decision is contrary to its prior pronouncements, as well as the mandates of Congress and this Court, the *Amici* support the Petitioners on Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF FACTS

Petitioners, Dr. R. Anthony Marrese and Dr. Michael R. Treister, are orthopaedic surgeons who applied for membership in the American Academy of Orthopaedic Surgeons in 1975 and 1974 respectively. Both were denied membership without a hearing or statement of reasons.

In 1976, Treister filed a lawsuit in the Circuit Court of Cook County, State of Illinois, alleging that: (1) the Academy did not follow its by-laws in processing his application; (2) the Academy violated his due process rights by refusing him membership; and (3) the Academy breached its written agreement of confidentiality with him by publishing his name in a list of applicants.

Marrese's state law suit alleged that: 1) the Academy refused to allow him a fair hearing on his application, and 2) the Academy's rejection of his application denied him due process under the United States Constitution and the Constitution of the State of Illinois.

The petitioners did not file a claim under the Illinois Antitrust Act in the state court action, nor did they contemporaneously file a federal antitrust suit.

On January 24, 1977, the circuit court heard argument and struck the two counts of Treister's complaint that alleged a breach of contract and violation of his constitutional rights. The court sustained the count regarding the failure of the Academy to follow its by-laws.

In the course of ensuing discovery, the Academy refused to respond to Treister's document request. After an in camera inspection, Judge Berg ordered that Dr. Treister's personal admissions file be produced by the Academy. The Academy refused to obey the order and that discovery issue was certified for appeal. The appellate court found, *inter alia*, that it was unnecessary to review the discovery order since Treister had failed to state a cause of action.

The petitioners filed this action on March 21, 1980 in Federal District Court for the Northern District of Illinois for damages and injunctive relief under Section 1 of the Sherman Act. The complaint charged denial of membership because: 1) the petitioners competed too vigorously, and 2) Treister had testified for a plaintiff in a medical malpractice suit against one of the members of the Academy. The respondent moved to dismiss the complaint claiming that the prior state court judgment barred the suit under the doctrine of res judicata. Judge Shadur denied the motion. *Treister v. American Academy of Orthopaedic Surgeons*, 496 F.Supp. 236 (N.D. Ill. 1980) on reconsideration, 524 F.Supp. 389 (N.D. Ill. 1981).

Pre-trial discovery commenced and the petitioners requested that the Academy produce all the admission files of applicants that were denied admission to the Academy in the last ten years (1970-1980). The Academy resisted

the discovery requests on First Amendment and contract grounds. On March 5, 1981, upon motion of the plaintiffs, (*see* Pet. App. K), Judge Shadur entered a production order for all the requested files subject to an "eyes only" protective order. On March 17, 1981, the Academy filed a tripartite motion seeking: a) a protective order for the files of the plaintiffs; b) reconsideration and clarification of the March 5, 1981, production order pertaining to non-party physicians who were denied membership; and c) an extension of time to comply with the March 5, order. (*See* Pet. App. R). On April 7, 1981, Judge Shadur entered his own protective order that was derived from the parties submissions. (*See* Pet. App. L and M). The Academy did not seek an *in camera* inspection, or any redaction. The Academy immediately appealed to the Seventh Circuit, and an order staying discovery was entered. After briefing, the appeal was dismissed and the stay order vacated. The Academy's continued refusal to produce the requested documents resulted in the plaintiffs seeking sanctions in July and August of 1981. Finally, after admitting the requested documents were in their possession, and waiving the issuance of a rule to show cause, the Academy was held in criminal contempt of court and fined $10,000.00. (*See* Pet. App. N)

A panel of the United States Court of Appeals for the Seventh Circuit reversed the judgment of contempt. 692 F.2d 1068. Rehearing en banc was requested and granted. Prior to the rehearing, the order granting rehearing en banc was vacated. A new decision was issued that reversed the contempt judgment but on narrower grounds than the prior opinion. 706 F.2d at 1489. The petitioners again successfully sought rehearing en banc. However, before the rehearing took place, the trial court certified

for immediate appeal the order that denied the Academy's motion to dismiss the complaint based on the doctrine of res judicata.

On September 16, 1984, the appeal from the contempt judgment was consolidated with the appeal from the denial of the motion to dismiss for purposes of rehearing en banc. On September 20, 1983, the combined rehearing en banc was held.

On January 3, 1984, the Seventh Circuit Court of Appeals issued the decision which is sought to be appealed to this Court. The Seventh Circuit's decision: 1) reversed the criminal contempt judgment, and 2) dismissed the underlying action because the state-court judgment barred the subsequent federal antitrust action on res judicata grounds. This plurality decision split the court 5-4 on the two issues. The Judges rationales were divided differently on each issue.

In reversing the contempt judgment, the plurality reviewed the underlying discovery order and found that the Academy had "if not a First Amendment right, a First Amendment interest," in its membership files. This "right or interest" was to be protected by limiting discovery. In dismissing the underlying action, the plurality found that: 1) 28 U.S.C. 1738 was inapplicable because Illinois courts could not hear a federal antitrust case (Slip Op. at 7); and 2) nothing prevented a federal court from giving a state-court judgment greater preclusive effect in a federal action than in a state court. (Slip Op. 7, 26). This *amicus* petition addresses these issues.

This Court granted the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit on June 25, 1984, on the following questions:

1. Whether the Seventh Circuit's refusal to consider the principles of Illinois' claim preclusion law while holding that the previous judgments of the Illinois courts bar this exclusively federal antitrust action conflicts with the holding of this Court in *Migra v. Warren City School Dist. Bd. of Educ.*, ___ U.S. ___, 104 S.Ct. 892, 896 (1984), that "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered"?

2. Whether it is one of the "accepted principles of res judicata" that no party may be precluded by a prior litigation from raising a claim that such party could not have raised in that prior litigation, due to the lack of subject matter jurisdiction of the first tribunal over the subsequent claim, and, if so, whether the Seventh Circuit's aforesaid claim preclusion holding also conflicts with *Federated Department Stores v. Moitie*, 452 U.S. 394, 398-99 (1981)?

3. Whether a state court's dismissal of a state common law action for failure to allege a claim may preclude a subsequent exclusively federal antitrust action between the same parties, because of the possibility that the plaintiff in the federal antitrust action could previously have brought a state antitrust claim against the defendant in that action (but did not), when the available state antitrust statute provides for more limited relief than that which is provided by the federal antitrust laws?

ARGUMENT

I.

THE PLURALITIES NEWLY FORGED THEORY OF RES JUDICATA IGNORES THE MANDATES OF 28 U.S.C. SEC. 1738 AND DECISIONS OF THIS COURT

It is well settled that the federal courts must give a state court judgment the exact same preclusive effect in the federal system as it would have in the rendering state. 28 U.S.C. sec. 1738. This mandate has been confirmed most recently by this Court in *Migra v. Warren City School District Board of Education*, No. 82-738, ___ U.S. ___, 104 S.Ct. 892 (1984). Moreover, decisions of this Court over the last century have consistently reached the same conclusion. *See Haring v. Prosise*, ___ U.S. ___, 103 S.Ct. 2368 (1983); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980); *Union and Planter's Bank of Memphis v. City of Memphis*, 189 U.S. 71 (1903); and *Board of Public Works v. Columbia College*, 84 U.S. 521 (1873). The Seventh Circuit Court of Appeals itself has also recognized the proper preclusive effect of a state court judgment. *See Mendenino v. Pollard*, 718 F.2d 845 (1983); *Lee v. City of Peoria*, 685 F.2d 196 (1982); *Hart v. City of LaSalle*, 679 F.2d 123 (1982). Nevertheless, the plurality has held that nothing prevents giving a state court judgment greater preclusive effect in federal court than in state court. (Slip Op. at 7 and 26, Pet. App. at A-7 and A-26).[1]

[1] In light of *Migra*, the Seventh Circuit has reconsidered the posture it took in the case sub judice and is now in accord with *Migra*. *See, Hagee v. City of Evanston*, No. 83-1712, ___ F.2d ___ (7th Cir. March 9, 1984).

Additionally, the plurality claims that it can circumvent the application of sec. 1738 because Illinois courts lack jurisdiction to hear a Sherman Court suit. The plurality does not cite any authority in support of this proposition; and in fact, this Court has ruled to the contrary. The cases in which this Court addressed the issues involving the application of sec. 1738 have held that absent federal law to the contrary, a federal court must apply the laws of the rendering state in order to determine what preclusive effect a state court judgment should be given. *See Migra, Haring, Kremer,* and *Allen.*

Section 1738 should be applied to the case at bar because there is no federal law "to the contrary" (aside from the Seventh Circuit's unprecedented holding below). The lack of state court jurisdiction to hear Sherman Act cases is a factor to be used in applying the rendering states preclusion formula, and not to circumvent the application of sec. 1738.

The Seventh Circuit, by ignoring the mandates of this Court and sec. 1738, has created a nonpareil federal res judicata doctrine. The product of this departure from normal judicial proceedings is a morass of confusion. There are no precedents or guidelines to predict the preclusive effect of a state court judgment on exclusively federal actions.

II.

THE PLURALITY'S DECISION ABOLISHES THE JURISDICTIONAL COMPETENCY REQUIREMENT NECESSARY TO BAR A SUIT UNDER THE DOCTRINE OF RES JUDICATA

It is axiomatic that state courts are not jurisdictionally competent to hear exclusively federal claims. Moreover, this Court has held that the doctrine of res judicata will not bar a claim that could not have been raised in a prior action between the parties. *See Federated Department Stores v. Moitie,* 452 U.S. 394 (1981). In *Moitie,* this Court said:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner v. Sunnen,* 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac,* 94 U.S. 351, 352-353 (1877).

Moitie, 452 U.S. at 398. Thus, as a matter of jurisdiction, the state court judgment here cannot have preclusive effect over the federal cause of action since the Sherman Act claim could not have been raised in the state case. Illinois law is in accord. *See Spiller v. Continental Tube Co.,* 95 Ill.2d 422 (1983); *People v. Kid,* 396 Ill. 405 (1947), and *Retrospective Service v. R. W. Borrowdale Co.,* 77 Ill.App.3d 518 (1979).

The plurality's holding conflicts with the great weight of authority that holds that a state court judgment cannot bar an exclusively federal action. *See Brown v. Felsen,* 442 U.S. 127 (1979); *RX Data Corp. v. Department of Social Services,* 684 F.2d 192 (2d Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255 (7th Cir. 1981), cert.

denied, 450 U.S. 921 (1982); *Kozak v. Florence Driveway and Park District of Peoria*, 582 F.2d 379 (7th Cir. 1978), cert. denied, 439 U.S. 1080 (1979); *Hagen v. Solomon*, 597 F.2d 950 (5th Cir. 1979); *Clark v. Watchie*, 513 F.2d 994 (9th Cir. 1975), cert. denied, 423 U.S. 941 (1975); *Abramson v. Pennwood Investment Corp.*, 392 F.2d 358 (6th Cir. 1967); *Crown Top Creamery v. Dean Milk Company*, 383 F.2d 358 (6th Cir. 1967); and *Lyons v. Westinghouse Electric Corporation*, 222 F.2d 184 (2nd Cir. 1955). Indeed, the plurality's newly formulated res judicata theory has abolished the jurisdictional competency requirement of the doctrine of res judicata in contravention of these authorities.

The Seventh Circuit's holding is also directly opposite to the Restatement of Judgments—an authority the plurality incorrectly cites as supportive. (Slip Op. at 29, Pet.App. at A-29.) Illustration 2 of comment (c), sec. 24(1)(c), chapter 3, of the Restatement of Judgments, Second (1982) reads:

> A Co. brings an action against B Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred.

The plurality also incorrectly relies on *Nash County Board of Education v. The Biltmore Company*, 640 F.2d 484 (4th Cir. 1981) in an attempt to justify its new res judicata theory. The dissent correctly points out that *Nash* should not be followed because:

> 1) It eliminated the requirement of jurisdictional competency established by this court in *Federated Department Stores v. Moitie*. (Slip Op. at 58, Pet. App. at A-57).

> 2) It involved strong equitable considerations. The first state law suit was settled by the entry of a negotiated consent decree. (Slip Op. at 58, Pet. App. at A-58).
>
> 3) It involved state statutes that were identical to the federal statutes. (Slip Op. at 59, Pet. App. at A-59).
>
> 4) It "did not even suggest that a prior state court action as different from the subsequent exclusively federal actions as the prior state court actions here, could constitute the same 'cause of action' ". (Slip Op. at 60, Pet. App. at A-60).
>
> 5) It involved an attempt to re-litigate an antitrust claim. (Emphasis in original) (Slip Op. at 24, Pet. App. at A-59).

The only other case that allows a prior state court judgment to bar an exclusively federal action is *Derish v. San Mateo-Burlingame Board of Realtors*, 724 F.2d 1347 (9th Cir. 1983). However, the same distinctions that apply to *Nash* also apply to *Derish*. Additionally, both courts found that if different liability standards exist between the Illinois Antitrust Act and the Sherman Act, then res judicata will not apply. *Derish, supra*. The plurality ignored the distinctions between *Nash* and the case at bar, along with the aforementioned antitrust laws in applying its new theory of res judicata.

III.

THE PLURALITY OPINION PLACES UNWARRANTED OBSTRUCTIONS IN THE PATH OF STATE LAW ENFORCEMENT

The plurality, by their unprecedented deviation from the path of normal judicial proceeding, has usurped the power of the states to enforce their respective laws by disregarding the mandates of: 1) 28 U.S.C. sec. 1738; 2) this Court

regarding the application of sec. 17:38; 3) the other circuits; and 4) the doctrine of res judicata.

This usurpation has the following detrimental effects on state law enforcement. *First*, the preclusive effect of a state court judgment cannot be gauged. Thus any state policies as to the limitation of the res judicata effects of its judgments is obliterated. *See* Currie, *Res Judicata: The Neglected Defense*, 45 U.Chi.L.Rev. 317, 327 (1978) (Slip Op. at 51, Pet. App. at A-51). *Second*, the unpredictability of the preclusive effect of judgments, combined with the role of the *amici* in representing a myriad of state agencies, will result in litigation and administration problems. Because the res judicata effects of a state court judgment will not be known, the states will have to file additional lawsuits in both state and federal courts to insure that the state and its citizens get full relief. Hence, this decision is contrary to the policies of res judicata. *Third*, it will strip the states of their right to formulate their own state antitrust policies because plaintiffs will be filing directly in federal court to insure full relief. This will result in federal judges, rather than state courts, molding the Illinois Antitrust laws, creating an impermissible burden on the State's Tenth Amendment rights.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully requests this Court to reverse the judgment of the Court of Appeals for the Seventh Circuit and to remand the case to the district court for further proceedings.

DATED: August 9, 1984

Respectfully submitted,

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PETITIONER'S

BRIEF

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No. 83-1452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

R. ANTHONY MARRESE and MICHAEL R. TREISTER,

Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondent.

BRIEF OF JOINT PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's refusal to consider the principles of Illinois' claim preclusion law while holding that the previous judgments of the Illinois courts bar this exclusively federal antitrust action conflicts with the holding of this Court in *Migra* v. *Warren City School Dist. Bd. of Educ.*, ___U.S. ___, 104 S.Ct. 892, 896 (1984), that "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered"?

2. Whether it is one of the "accepted principles of res judicata" that no party may be precluded by a prior litigation from raising a claim that such party could not have raised in that prior litigation, due to the lack of subject matter jurisdiction of the first tribunal over the subsequent claim, and, if so, whether the Seventh Circuit's aforesaid claim preclusion holding also conflicts with *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 398-99 (1981)?

3. Whether a state court's dismissal of a state common law action for failure to allege a claim may preclude a subsequent exclusively federal antitrust action between the same parties, because of the possibility that the plaintiff in the federal antitrust action could previously have brought a state antitrust claim against the defendant in that action (but did not), when the available state antitrust statute provides for more limited relief than that which is provided by the federal antitrust laws?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

R. ANTHONY MARRESE and MICHAEL R. TREISTER,

Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondent.

BRIEF OF JOINT PETITIONERS

Petitioners, R. Anthony Marrese, M.D. ("Dr. Marrese"), and Michael R. Treister, M.D. ("Dr. Treister"), hereby respectfully submit their brief on the merits, pursuant to this Court's grant of a writ of certiorari to review the Questions Presented by the January 3, 1984, decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The in banc decision of the Court of Appeals is reported at 726 F.2d 1150 (1984) and appears as Appendix A, incorporated by reference in the Joint Appendix.[1] The two

[1] All references herein to the "Appendix" are to the previously filed Appendix to the Joint Petition for a Writ of Certiorari. Items A through J, O and U of that Appendix have been incorporated in the Joint Appendix.

previous, successively vacated panel decisions of the Court of Appeals in the respondent's consolidated appeal of its criminal contempt conviction are reported at 692 F.2d 1083 and 706 F.2d 1488, respectively, and appear as Appendices B and C.

The district court's four decisions holding that this exclusively federal antitrust action is not barred by the petitioners' previous state court actions are reported at 496 F.Supp. 236 and 524 F.Supp. 389 and appear as Appendices E through H.

JURISDICTION

The decision and judgment of the Court of Appeals were entered on January 3, 1984. The joint petition for a writ of certiorari was filed on March 2, 1984, and was granted, as limited to the first three Questions Presented, on June 25, 1984. 52 *U.S.L.W.* 3917.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The privileges and immunities clause of the United States Constitution, Article IV, § 2, provides that:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States."

The due process clause of the Fifth Amendment to the United States Constitution provides that:

> "No person shall be ... deprived of life, liberty, or property, without due process of law."

The Tenth Amendment to the United States Constitution provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 4 of the Clayton Act, 15 U.S.C. § 15, as in force at the time of these petitioners' previous state court actions and at the time of the commencement of the present action, provided that:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Article 1, § 12 of the Illinois Constitution provides that:

> "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly."

Section 2-619(a)(3) of the Illinois Code of Civil Procedure (Ill.Rev.Stat., 1982, ch. 110, ¶2-619(a)(3)) provides that:

> "Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds .... (3) That there is another action pending between the same parties for the same cause."

15 U.S.C. §§ 1, 15(a), 15c(a); 28 U.S.C. §§ 1254(1), 1292(b), 1738; and Ill.Rev.Stat., 1981, ch. 38, §§ 60-3(1) to (4) and 7(2) are set forth in Appendix U.

STATEMENT OF THE CASE

Drs. Marrese and Treister are board-certified orthopaedic surgeons who have been excluded "without a hearing or a statement of reasons" (App. A-1) from membership in the respondent, which is a national professional association so dominant in that profession as to possess, through its members,

monopoly power. *Wilk* v. *American Medical Ass'n*, 719 F.2d 207, 212 (7th Cir. 1983); *Treister* v. *American Academy of Orthopaedic*, 78 Ill. App. 3d 746, 396 N.E.2d 1225, 1236-37, 1239 (1979).

The reasons for the petitioners' exclusion are of primary concern to this federal antitrust case. At the time of his application, Dr. Treister was told by the respondent's interviewer, a member of the respondent, that his "improper" testimony for a plaintiff in a medical malpractice action against another member of the respondent and his acceptance of part-time professional employment during his term of orthopaedic surgical residency would probably result in his exclusion (Joint App. 11-12). Both then and later, he was denied any *other* explanation for the respondent's rejection of his application or any opportunity to "question" that decision (id., at 24). Dr. Marrese received no explanation at all of his rejection, nor any opportunity to question it (id., at 16-21), but he, too, has alleged that he was excluded for illegal reasons (id., at 23-24).

The absence of procedural protections for these petitioners was not accidental; *it was the intended result of the respondent's by-laws, which seek to prevent any knowledge by the applicants of the reasons for exclusion*. Thus, the respondent interprets its own rules as prohibiting any disclosures to applicants concerning the contents of their files, or any "questioning" of an adverse decision after it has been made. This interpretation underlies its pending counterclaim against the petitioners (R.33) for allegedly breaching their "application contract" with the respondent by bringing this antitrust action and by seeking discovery in order to prove their allegations of anticompetitive intent. The alleged culmination of this process is a secret "one-third veto vote of competitors" (Joint App. 26).

Moreover, the allegations of the Amended Complaint reach far beyond the particular circumstances of these petitioners' exclusions. Rather, those exclusions allegedly "had the purpose and effect of coercing them and other orthopaedic

surgeons who hoped to become members of the [respondent] to avoid any public criticism of their colleagues (particularly, those who were already members) or any significant display of non-conformity with the latter's currently favored social or business practices" (id., at 25-26). The respondent's " 'additional' admissions criteria . . . have been left vague, arbitrary and unchallengeable because [its] members have collectively desired such arbitrary control over entrants" (id., at 27).

During the district court discovery litigation that led to the present decision, the respondent's attorneys argued that the petitioners did not need to see their application files because the information in them would not "substantially add to or detract from the [petitioners'] general understanding of the facts" (R. 91, p. 5). During the appeal of the subsequent criminal contempt order for refusal to permit this discovery, the respondent's attorneys argued to the Court of Appeals that certain statistical data cast doubt upon the petitioners' charges of a conspiracy to deter expert medical malpractice testimony for plaintiffs in the Chicago area, where Dr. Treister lives. Yet, they were forced to retract that argument when the petitioners' attorneys examined those same figures. A closer examination of the respondent's own data revealed that Dr. Treister may have been the only orthopaedic surgeon in the Chicago metropolitan area *in seventeen years* who had testified for a plaintiff in a medical malpractice action against a member of the respondent prior to the time when he could be considered for membership (R. 269, Attach. B at p. 9).

This, then, is the sort of alleged anticompetitive coercion that the respondent's collective membership can bring to bear through its alleged anticompetitive admissions system—anywhere throughout this country. *Treister* v. *American Academy of Orthopaedic*, supra.

The Proceedings Below

As described in the Plurality Opinion of Judge Posner (App. A-1 to 2), this federal antitrust action under section 1 of

the Sherman Act was brought after both petitioners had unsuccessfully sought state court relief for their unexplained exclusions based upon a state common law theory of associational rights.

Before seeking relief in the state courts, Drs. Marrese and Treister had requested of the respondent that they be provided with all information from their application files on which the respondent had based its decision to deny them membership, and a hearing on those denials before an impartial hearing person. Their requests were denied. Both doctors then filed separate state declaratory judgment actions. Dr. Marrese's action was stayed pending the outcome of an interlocutory appeal of Dr. Treister's case by the respondent. The Illinois Appellate Court ordered Dr. Treister's complaint for declaratory relief dismissed for failure to state a cause of action, noting that membership in the respondent is not an "economic necessity." *Treister* v. *American Academy of Orthopaedic Surgeons*, 78 Ill.App. 3rd 746, 755-56, 56, 396 N.E. 2d 1225, 1232 (1979). This federal antitrust action was then filed by Drs. Marrese and Treister, and Dr. Marrese's state declaratory judgment action was later dismissed on the respondent's motion.

The district court sustained this antitrust action against the respondent's claim preclusion defense because of the fact that the federal courts have exclusive jurisdiction over federal antitrust actions. Therefore, *this action could never have been brought in the Illinois courts.* The district court also emphasized the absence of any previous findings of fact by the Illinois courts (App.E).

Subsequent to this initial ruling, the district court ruled twice more against the respondent on the claim preclusion issue prior to the above-mentioned criminal contempt citation (App.F and G) and once again shortly afterward (App.H). However, another district judge who had been assigned to the case in early 1983 certified that issue (and certain issue

preclusion issues) for interlocutory appeal on September 14, 1983, six days before the scheduled in banc rehearing of the criminal contempt appeal (App.I). On Friday, September 16, the Seventh Circuit accepted that certification for hearing in banc together with the criminal contempt appeal (App.J).

The consolidated in banc hearing took place on September 20 (App. A-1). It resulted in a 5-4 vote to require the dismissal of the entire action on claim preclusion grounds and a differently divided 5-4 vote to reverse the criminal contempt judgment. The integral relationship between those two aspects of the decision here reviewed is shown by Judge Bauer's concurring opinion:

> "I concur in the result. Moreover, if I thought it necessary, I would approve *that portion of the opinion which holds the discovery order invalid.* It is, however, sufficient, in my opinion, to rule that the complaint should have been dismissed on res judicata grounds" (App. A-23) (emphasis supplied).

The opinion concurred in by Judge Bauer, though, held as follows:

> "The next question is whether the order is invalid merely because, as we have held, Judge Shadur should have dismissed the suit on res judicata grounds before the order was entered. Although we cannot find any authority on the precise question, probably because criminal contempt is a rarely imposed sanction for violation of a discovery order, *we believe that the discovery order does fall with the underlying suit.*"
>
> (App. A-15) (emphasis supplied)

This was the result with which Judge Bauer concurred, the discovery order being held to be invalid because the underlying suit was held to be invalid by the Court's ruling on the claim preclusion issue.

SUMMARY OF THE ARGUMENT

The argument of the petitioners will show, first, that the Seventh Circuit's decision of this case misconstrued the require-

ments of the Full Faith and Credit Statute, as interpreted by this Court's decisions. A federal court may never grant a state court judgment a different preclusive effect from that which it would receive in the courts of the judgment-rendering state unless due process or a supervening federal statute that poses an "irreconcilable conflict" with the Full Faith and Credit Statute requires the "partial repeal" of that earlier statute. Illinois' claim preclusion law clearly prevents the preclusion of this exclusively federal claim, and the only supervening statutes in this case are the Sherman and Clayton Acts, over which the federal courts have exclusive jurisdiction. Those statutes cannot logically be said *to favor* the preclusion of exclusively federal antitrust claims that would not be precluded under state law principles. Therefore, the Seventh Circuit erred in dismissing this exclusively federal claim without considering those state law principles.

On the other hand, the important federal policies underlying the grants of exclusive federal jurisdiction and a logical application of traditional claim preclusion principles alike require that exclusively federal claims never be barred by *claim preclusion* as the result of a previous state court judgment. Powerful constitutional and comity arguments against such preclusion merely confirm this logical result.

The argument then shows that, even if a state antitrust action could conceivably "substitute" for an exclusively federal antitrust action if the standards of liability and remedies were the same, the Seventh Circuit's approach toward determining such identity in this case was erroneous. It was error for the circuit court to refuse to consider the decisions of this Court in determining whether the state and federal standards of liability could *possibly* be different, and this error was compounded by the plurality's rank speculation as to whether an acknowledged difference in the available damages remedies "really" mattered to these petitioners.

Furthermore, the "identity" analysis, if ever appropriate, must be confined to cases in which two successive *antitrust* actions (or other corresponding state and exclusively federal actions) are brought. Otherwise, the numerous interrelated policy considerations that oppose any departure from the traditional claim preclusion analysis become insuperable. Thus, even if this Court should accept the "identity" analysis in part, that novel approach must not be extended so far as to deter the routine litigation of state law claims in the state courts. For basic reasons of fairness, comity, federalism and judicial efficiency, even apart from antitrust enforcement, an "identity" of antitrust actions should never be found unless there has in fact been a preceding state antitrust claim.

Finally, the petitioners contend that this Court should reverse the criminal contempt decision as well as the claim preclusion decision. The Seventh Circuit concluded that the criminal contempt "fell with the case," but, because the case does not fall, neither does the criminal contempt. This Court should recognize and reject this final error of the Plurality Opinion in basing its analysis of the discovery issues upon a novel conception of the First Amendment—when it had just expressly held that the supposed claim preclusion of this exclusively federal action also precluded the respondent's criminal contempt.

ARGUMENT

I

ILLINOIS' CLAIM PRECLUSION LAW, APPLICABLE BY THE MANDATE OF THE FULL FAITH AND CREDIT STATUTE, PROHIBITS THE PRECLUSION OF THIS EXCLUSIVELY FEDERAL CLAIM.

A. The Command of Section 1738

The Plurality Opinion of the Seventh Circuit ignored the teachings of this Court in *Allen* v. *McCurry*, 449 U.S. 90 (1980), *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982), and *Haring* v. *Prosise*, ___ U.S. ___, 76 L.Ed. 2d 595, 103 S.Ct. 2368 (1983), concerning the preclusion law to be applied by the federal courts to previous state court judgments under 28 U.S.C. § 1738, the Full Faith and Credit Statute. It also ignored fundamental principles of comity and federalism, partially embodied in that statute, by in effect punishing the petitioners for having brought their state common law claims in a state court forum. *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

By granting the previous Illinois court judgments against these petitioners greater preclusive effect in federal court than those judgments would have in the courts of Illinois (App. A-7, 26), the Seventh Circuit refused to apply the rule of *Allen*, *Kremer* and *Haring*. This Court's recent decision in *Migra* v. *Warren City School Dist. Bd. of Ed.*, ___ U.S. ___, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984), which applied the rule of those decisions, removed any possible doubt that the Seventh Circuit's decision of this case was in error. The court below clearly misconstrued the statutory mandate of section 1738, which is to grant state court judgments the "same" preclusive effect in "every court within the United States . . . as they have by law or usage in the Courts of [the] state . . . from which they are taken." 28 U.S.C. § 1738 (1976).

In *Allen*, this Court reemphasized the importance of the Full Faith and Credit Statute in this country's federal legal system, ruling that:

> "[T]hough the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so."
>
> (*Allen* v. *McCurry*, 449 U.S. 90, 96 (1980))

It therefore held that Missouri's law of issue preclusion was applicable to the respondent's claim under 28 U.S.C. § 1983 against the petitioner police officers for their alleged deprivation of his Fourth and Fourteenth Amendment rights, after a Missouri criminal court's determination that those rights had not been violated.

In *Kremer*, this Court likewise ruled that:

> "It has long been established that [28 U.S.C.] § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. *Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.*"
>
> (*Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 481-82) (emphasis supplied)

There, this Court also emphasized the comity and federalism interests embodied in section 1738, finding that the denial of finality to state court judgments would be destructive of the quality of state court review procedures and would tend to lessen the use of those procedures by the parties to employment discrimination disputes (*id.*, at 478). It therefore held that New York's law of issue preclusion was applicable to the petitioner's claim under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) for alleged employment dis-

crimination, after a New York court's unanimous affirmance of the determination by the New York State Division of Human Rights that no such discrimination had occurred.

Both *Allen* and *Kremer* involved major federal civil rights statutes that had previously been held to require special *limitations* upon the preclusive effect of state court judgments. The fact that no such limitations were allowed by this Court, even in those cases, demonstrates that there could be few, if any, federal statutes that would require the *expansion* of the preclusive effect of such judgments. If even the civil rights laws could not effect the "partial repeal" of section 1738 so as to *allow* a federal claim (*Kremer* v. *Chemical Construction Corp.*, supra, 456 U.S. at 468), then what law, much less, novel judicial policy, could accomplish a "partial repeal" so as to *preclude* a federal claim, especially one which could *only* be brought in federal court? Thus, in *Folsom Inv. Co., Inc.* v. *Moore*, 681 F.2d 1032, 1035 (5th Cir. 1982), the Fifth Circuit immediately drew this deduction from the language just quoted:

> "*Kremer* apparently dooms the assumption of many courts and commentators that federal courts may be free to grant *greater* preclusive effect to state court judgments than would the courts of the judgment-rendering state."

Subsequently, in *Haring*, this Court explicitly confirmed the same point:

> "If the state courts would not give preclusive effect to the prior judgment, 'the courts of the United States can accord it no greater efficacy' under § 1738. *Union & Planters' Bank of Memphis* v. *Memphis*, 189 U.S. 71, 73, 23 S.Ct. 604, 606, 47 L.Ed. 712 (1903)."
>
> (*Haring* v. *Prosise*, supra, 103 S.Ct. at 2373 n.6)

It therefore unanimously held that, because the courts of Virginia would not construe a plea of guilt in a criminal proceeding as preclusive of the issue of whether the defendant's

Fourth and Fourteenth Amendment rights had been violated by a search and seizure of evidence, the federal courts, too, could not treat that issue as foreclosed.

Accordingly, with the exception of the present case, virtually every federal circuit court decision since *Kremer* that has construed section 1738 has recognized, at least implicitly, that the federal courts are not free to use a previous state court judgment to preclude an issue or a claim that would not have been precluded by the law of the judgment-rendering state.[9]

---

[9] *See Gonsalves* v. *Alpine Country Club*, 727 F.2d 27, 27 n.1, 29 (1st Cir. 1984); *Keating* v. *Carey*, 706 F.2d 377, 383 (2nd Cir. 1983); *Towers, Perrin, Forster & Crosby, Inc.* v. *Brown*, 732 F.2d 345, 347, 351 (3rd Cir. 1984); *Kutzik* v. *Young*, 730 F.2d 149, 151 (4th Cir. 1984); *Superior Oil Co.* v. *City of Port Arthur*, 726 F.2d 203, 206 (5th Cir. 1984); *Loudermill* v. *Cleveland Board of Education*, 721 F.2d 550, 556 (6th Cir. 1983), *appeal pending*; *Unger* v. *Consolidated Foods Corp.*, 693 F.2d 703, 704, 706 (7th Cir. 1982), *cert. denied* ____ U.S. ____, 104 S.Ct. 549 (1983); *Brown* v. *St. Louis Police Dept.*, 691 F.2d 393, 395 (8th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1882 (1983); *Dorish* v. *San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347, 1349 (9th Cir. 1983); *Carpenter* v. *Reed ex. rel. Dept. of Pub. Safety*, 728 F.2d 1302, 1303 (10th Cir. 1984); *Burney* v. *Polk Community College*, 728 F.2d 1374, 1379 (11th Cir. 1984).

The only exception to this well settled rule is *Deweese* v. *Town of Palm Beach*, 688 F.2d 731 (11th Cir. 1982). In *Deweese*, the court held that the application of issue preclusion presented a question of federal law, failing to mention § 1738. In holding that the federal common law of issue preclusion applied (as opposed to state law under § 1738), *Deweese* relied upon two prior Fifth Circuit opinions. However, since *Folsom Inv. Co., Inc.* v. *Moore*, supra, 681 F.2d 1032, 1035 (5th Cir. 1982), the Fifth Circuit has regularly applied *Kremer*. In the case of the two pre-*Kremer* Fifth Circuit decisions relied upon in *Deweese*, the prior judgments had been from a federal forum in the diversity context. *See* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 773 (1976). Furthermore, *Burney* v. *Polk Community College*, supra, 728 F.2d 1374 (11th Cir. 1984), has now implicitly overruled *Deweese*.

Yet, in the present case, the Plurality Opinion stated that:

> "[S]ection 1738 ought not prevent a federal court from giving a state judgment *more* effect in a federal suit than the courts of the state would give it in a state suit." (App. A-7)

Moreover, Judge Flaum's concurring opinion

> "... agreed with Judge Posner that we are not constrained by section 1738 as long as we do not give a state court judgment less preclusive effect than would the courts of the state from which the judgment is taken."
>
> (App. A-26; see also Judge Bauer's concurring opinion at App. A-23)

This initial error of the Seventh Circuit's decision was corrected in *Hagee* v. *City of Evanston*, 729 F.2d 510 (1984). There, a panel of the Seventh Circuit which included Judges Flaum and Bauer unanimously held that:

> "Although some courts and commentators have suggested that a federal court sometimes may apply a federal rule of res judicata and give a *greater* preclusive effect to a state court judgment than would be accorded by that state's law ..., the Supreme Court recently laid this proposition to rest in the case of *Migra* v. *Warren City School District Board of Education* .... Thus, it is clear that we must give the decision in the appellant's state court suit the same preclusive effect—no more, no less—as would the courts of Illinois. Accordingly, we will examine the Illinois law of res judicata."
>
> (*Hagee*, supra, 729 F.2d at 512)

Migra did, of course, once again confirm that a state court judgment may not receive greater preclusive effect in federal court than it would receive in the courts of the state in which that judgment was rendered (see *Migra* v. *Warren City School Dist. Bd. of Ed.*, supra, 104 S.Ct. at 899 and authorities there

cited; see also, e.g., *Board of Pub. Works* v. *Columbia College*, 84 U.S. 521, 529 (1873); *Restatement (Second) of Judgments* § 86 (1982); *Restatement (Second) of Conflict of Laws* § 95 (1971); *Restatement of Conflict of Laws* § 450 (1934)). However, that decision did not alter in any way the previously required rule of construction of the Full Faith and Credit Statute; it merely made clear that, except by the necessary "partial repeal" of that statute, the preclusive effect of state court judgments could not be limited so as to allow a party to maintain a federal claim that would otherwise be barred by state claim preclusion principles. Here, the Seventh Circuit found a total claim preclusion *whether or not* Illinois' preclusion law would require it. The decision in this case was, therefore, illogical and contrary to controlling precedent when rendered.

Furthermore, because a federal court may not accord a state court judgment greater preclusive effect than that judgment would receive in the judgment-rendering state, the plurality's additional conclusion that section 1738 is completely "inapplicable" to cases of exclusive federal jurisdiction, so that such a case may be especially subject to claim preclusion resulting from a previous state court judgment (App. A-7), is absurd. If anything, the fact that such a claim could never be brought in state court, or would have to be dismissed for lack of subject matter jurisdiction if it were, must make it *less* appropriate for claim preclusion by a state court judgment than any other kind of claim over which the state court might exercise jurisdiction—not more so. Surely, there is nothing peculiar to the factor of exclusive federal jurisdiction that militates *against* the exercise of such jurisdiction by a federal court following a state court judgment.

Hence, the plurality's conclusion on this point was particularly illogical. It not only "turn[ed] federalism on its head" (*Steffel* v. *Thompson*, 415 U.S. 452, 472 (1974)) but also failed to take account of the possibility of applying state preclusion *principles* (App. A-51 to 52). Contrary to the plurality's

analysis, those principles are not rendered inherently "inapplicable" merely because the state courts would rarely, if ever, be able to apply them to exclusively federal claims or issues (App. A-7). The only reason that the state courts must in such cases leave the application of those state principles to the federal courts is the state courts' jurisdictional incompetency to consider exclusively federal claims—a factor which in itself contradicts any attempt to accord those courts' judgments especially great preclusive effect in exclusively federal cases.

B. Illinois' Claim Preclusion Law

Under the principles of Illinois' claim preclusion law, this exclusively federal claim could not be precluded for at least the following three reasons. First, no legal issues arising from this claim "could have been raised or determined" in the original action in the Illinois courts, and this claim therefore fails to satisfy the prior jurisdictional competency requirement of claim preclusion.[3] Second, the prevailing test of the identity of "causes of action" under Illinois law is whether "the evidence needed to sustain the second action would have sustained the first," and this claim can be sustained without the showing of "economic necessity" that was held to be necessary in order to

[3] See, e.g., *Spiller* v. *Continental Tube Co.*, 95 Ill. 2d 423, 432, 447 N.E.2d 834, 838 (1983) ("The principle extends not only to questions which were actually litigated but also to all questions which could have been raised or determined," in the original action, as part of the same "claim, demand or cause of action"); *Hughey* v. *Industrial Commission*, 76 Ill. 2d 577, 582, 394 N.E.2d 1164, 1166 (1979); *LaSalle National Bank* v. *County Board of School Trustees*, 61 Ill. 2d 524, 529-30, 337 N.E.2d 19, 22 (1975); *Harney* v. *Aurora & G. Ry. Co.*, 186 Ill. 283, 294, 57 N.E. 857, 861 (1900). See also *Redfern* v. *Sullivan*, 111 Ill.App.3d 372, 375, 444 N.E.2d 205, 208 (1983); *Newberg* v. *Michael Reese Hospital and Medical Center*, 118 Ill.App.3d 93, 99, 454 N.E.2d 684, 688 (1983); *In Re Marriage of Donnellan*, 90 Ill.App.3d 1032, 1035, 414 N.E.2d 167, 171 (1980); *Furey* v. *H. F. Karl Contractors, Inc.*, 39 Ill.App.3d 1057, 1060, 351 N.E.2d 249, 252 (1976); *National Tea Co.* v. *Confection Specialties, Inc.*, 48 Ill.App.3d 650, 653, 362 N.E.2d 1150, 1152 (1977).

sustain the petitioners' previous state court claims.[4] Third, the Illinois courts do not recognize any doctrine of "waiver" of claims that are beyond their jurisdiction by the bringing of claims that are within their jurisdiction, whether through "forum selection," "election of remedies" or otherwise.[5]

There can be no dispute that the Illinois courts do not construe the Illinois claim preclusion doctrine as extending to claims with respect to which none of the legal issues "could have been raised or determined" in the original state court action. *Spiller* v. *Continental Tube Co.*, 95 Ill.2d 423, 432, 447 N.E.2d 834, 838 (1983). Likewise, there can be no dispute that the Illinois courts do *not* recognize any doctrine of waiver as described above. *Rotogravure Serv.* v. *R.W. Borrowdale Co.*, 77 Ill. App. 3d 518, 395 N.E.2d 1143, 1157 (1979). In short, there

[4] See, e.g., *Chicago Title & Trust Co.* v. *County of Cook*, 120 Ill. App.3d 443,454, 457 N.E.2d 1326,1334 (1983); *Olson* v. *Olson*, 114 Ill. App. 3d 28, 30, 448 N.E.2d 229, 232 (1983); *Redfern* v. *Sullivan*, 111 Ill.App.3d 372, 376, 444 N.E.2d 205, 208 (1983); *Cranwill* v. *Donahue*, 99 Ill.App.3d 968, 970-71, 426 N.E.2d 337, 339 (1981); *Morris* v. *Union Oil Co. of California*, 96 Ill.App.3d 148, 157, 421 N.E.2d 278, 285 (1981) (incompletely quoted in Judge Flaum's concurring opinion herein at App. A-27); and *Village of Northbrook* v. *County of Cook*, 88 Ill.App. 3d 745, 750, 410 N.E.2d 925, 929 (1980). But see the Seventh Circuit's contrary "interpretation" of the "policy considerations" underlying various Illinois Supreme Court precedents, in *Hagee* v. *City of Evanston*, supra, 729 F.2d at 513-15.

[5] To the contrary, Article I, § 12 of the Illinois Constitution provides a "Right to Remedy and Justice" for all claims cognizable by the Illinois courts, and any doctrine of the "waiver" of other claims by the exercise of this Illinois constitutional right would violate basic public policy. In addition, it is well settled that the "pursuit of a supposed, *but actually non-existent*, remedy is not an election which will bar the later successful prosecution of one actually existing, though inconsistent with the former." *Rotogravure Serv.* v. *R. W. Borrowdale Co.*, 77 Ill.App.3d 518, 528, 395 N.E.2d 1143, 1157 *(1979) (emphasis supplied)*. *See Restatement (Second) of Judgments* § 25 comment (m) (1982). Both petitioners' state court actions were, to repeat, dismissed *for failure to allege a claim.*

is no authority whatsoever for a "*Nash* exception"[6] under Illinois' claim preclusion law, and that fact alone necessarily prevents the preclusion of the present exclusively federal antitrust claim.

Furthermore, as shown by the most recent Illinois Appellate Court precedents, cited above, Illinois has not adopted the broad "transactional" test of a cause of action, notwithstanding the Seventh Circuit's recent misreading of the cases in *Hagee*, supra. See J. Landers, J. Martin, *Civil Procedure*, ch. XI A (1981), esp. at pp. 890 n.3 and 892-93 n.6(c).

C. Overriding Federal Law as an Exception to the Full Faith and Credit Statute

The questions remain whether, despite the impossibility of preclusion of the present claim under Illinois law, there might nevertheless be a special federal rule of preclusion, and, conversely, whether there might be an overriding federal requirement of *non-preclusion* that would obviate the necessity of finding that Illinois' preclusion law would not preclude this exclusively federal claim.

The first of these questions can be answered immediately by reference to *Haring* v. *Prosise*, ___ U.S. ___, 76 L.Ed. 2d 595, 103 S.Ct. 2368 (1983), and the foregoing analysis of the illogic of treating exclusively federal claims as more vulnerable than any other claims to preclusion by means of state court judgments. Thus, in *Haring* this Court instantly rejected the petitioner's contention that "a special federal rule of preclusion [was] necessary to preserve important federal interests in judicial administration"; unanimously, this Court

> "... fail[ed] to understand how any such interests justify the adoption of a rule *that would bar the assertion of constitutional claims which have never been litigated.*"
>
> (id., 103 S.Ct. at 2377 n.11) (emphasis supplied)

[6] *Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981), *cert. denied* 454 U.S. 878 (1981).

Here, the only remotely conceivable "special federal rule" of additional preclusion would be the curious "forum selection"/"election of remedies" theory embraced by the Fourth Circuit in *Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, 640 F.2d 484, supra, and by Judges Posner and Pell in their first panel decision in the present case (see App. B-12) but then abandoned—for compelling reasons that will be demonstrated below—in the Plurality Opinion. Thus, here, too, this Court may well "fail to understand" how any asserted federal interests could justify the adoption of a rule *that would bar exclusively federal antitrust claims which could not possibly have been litigated in state court.*[7]

As has been seen, in *Allen* and *Kremer* this Court laid down extremely exacting requirements for any departure from the application of state preclusion principles under the Full Faith and Credit Statute. Apart from possible due process objections to the state court judgment (which are discussed in the next section of this brief), "an exception to § 1738 will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468 (1982). In turn, because statutory repeals by implication are disfavored, the provisions of any later statute would either have to be in "irreconcilable conflict" with section 1738 or else "cover the whole subject" of that earlier statute and be "clearly intended as a substitute" for it (id.) before any such implicit partial repeal could be found. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). Neither of the

[7] See the foregoing discussion of *Folsom Inv. Co., Inc.* v. *Moore*, 681 F.2d 1032, 1035 (5th Cir. 1982). See generally 18 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 4476 (1981) (hereinafter cited as "Wright and Miller"), concluding that "whatever utility it may retain in other areas, election of remedies reasoning has become useless and potentially dangerous in dealing with preclusion by judgment" (id., at 773).

important civil rights statutes considered in *Allen* and *Kremer* could satisfy these requirements.

Nevertheless, the small number of federal statutes that create exclusively federal jurisdiction over claims arising under them do necessarily create an "irreconcilable conflict" with the Full Faith and Credit Statute *to the extent that such claims might otherwise be barred by state claim preclusion principles.* Moreover, the clearest case of such an "irreconcilable conflict" is that of exclusively federal claims brought under the Sherman and Clayton Acts (15 U.S.C. §§1, 2, 15, 26). Although neither of those statutes contains an unequivocal grant of exclusive federal jurisdiction,[8] both have long been recognized as exclusively federal in nature,[9] and are, therefore, "clear[ly] incompatib[le] [with] state-court jurisdiction" within the meaning of *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 478 (1981), *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 507-08 (1962), and *Claflin* v. *Houseman*, 93 U.S. 130, 137 (1876).

In *Migra*, this Court may well have been alluding to such "clear incompatibility" and "irreconcilable conflict" when it emphasized that:

> "In the present litigation, petitioner does not claim that the state court would *not* have adjudicated her federal claims had she presented them in her original suit in state court. *Alternatively*, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court."
>
> (*Migra* v. *Warren City School Dist. Bd. of Ed.*, supra, 104 S.Ct. at 898) (emphasis supplied)

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[8] Wright and Miller § 4470, at 691 n.41; Redish and Muench, *Adjudication of Federal Causes of Action in State Court*, 75 Mich. L. Rev. 311 (1976), *cited with approval* in *Gulf Offshore Co.* v. *Mobil Oil Co.*, supra, 455 U.S. at 484 n.13.

[9] *General Inv. Co.* v. *Lake Shore & Mi. So. Ry.*, 260 U.S. 261, 286-88 (1922); *Blumenstock Bros. Adv. Agency* v. *Curtis Pub. Co.*, 252 U.S. 436, 440 (1920).

This inference is supported by the fact that in *Brown* v. *Felsen*, 442 U.S. 127 (1979), this Court had already unanimously found one such irreconcilable conflict between the application of state claim preclusion principles and the exclusive federal jurisdiction over certain questions of dischargeability under section 17 of the former Bankruptcy Act (Act of Oct. 19, 1970, Publ. L. No. 91-467, §§ 5-7, 84 Stat. 992). *Brown* v. *Felsen* was cited in the first footnote of *Migra*.[10]

Further consideration of the convincing reasons for finding an irreconcilable conflict between exclusive federal jurisdiction and the claim preclusion of exclusively federal claims by previous state court judgments is momentarily postponed until the next section of this brief, but it is important to reemphasize here that such conflict can only arise *if the applicable state preclusion principles would otherwise require such preclusion.* Illinois' preclusion principles do nothing of the sort. Thus, it was clear error for the Seventh Circuit to hold that these petitioners' previous state court actions precluded this claim without considering those state law principles, which are fully applicable to this claim *because* they do not preclude it.[11] However, at the same time, those principles need not be considered by this Court because of the independent and overriding federal rule of nonpreclusion.

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[10] *Migra*, supra, 104 S.Ct. 892 at n.1. See the detailed discussion of *Brown* v. *Felsen*, infra, Section II.

[11] For this reason, *Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, supra, and *Derish* v. *San Mateo-Burlingame Bd. of Realtors*, supra, 724 F.2d 1347 (9th Cir. 1983), were also wrongly decided. Neither of those other decisions considered in detail the possibility that state claim preclusion principles might oppose the preclusive effect sought to be given to the previous state court judgments. However, *Nash* was decided before *Kremer*, and in *Derish* the question of whether California's preclusion rules would have barred the exclusively federal claim was apparently not raised by the plaintiff.

II

EXCLUSIVELY FEDERAL CLAIMS ARE AN IMPLIED EXCEPTION TO THE FULL FAITH AND CREDIT STATUTE AND MAY NEVER BE PRECLUDED BY A PRIOR STATE COURT JUDGMENT.

A. The General Federal Interest in the "Untrammeled" Enforcement of Exclusively Federal Claims

In order to ensure the effective, expert and uniform federal enforcement of the distinctively federal policies embodied in the grants of exclusive federal jurisdiction, the federal courts have declared the rule that exclusively federal claims may never be barred by claim preclusion as the result of previous state court judgments. As Judge Learned Hand wrote in *Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2d Cir. 1955):

> "[T]he grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that makes up the wrong .... There are sound reasons for assuming that such recovery should not be subject to the determinations of state courts. It was part of the effort to prevent monopoly and restraints of commerce; and it was natural to wish it to be uniformly administered, being national in scope .... *Obviously, an administration of the Acts, at once effective and uniform, would best be accomplished by an untrammeled jurisdiction of the federal courts.*"
>
> (id., at 189) (emphasis supplied)

The great weight of judicial authority is in accord. See, e.g., *RX Data Corp.* v. *Department of Social Services*, 684 F.2d 192, 198 (2d Cir. 1982); *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 247 (7th Cir. 1981), *cert. denied* 455 U.S. 921 (1982); *Central States, Etc.* v. *Old Sec. Life Ins.*, 600 F.2d 671,

676 (7th Cir. 1979); *Hayes* v. *Solomon*, 597 F.2d 958, 983-84 (5th Cir. 1979), *cert. denied* 444 U.S. 1078 (1980); *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 583 F.2d 378, 379 (7th Cir. 1978), *cert. denied* 439 U.S. 1090 (1979); *Cotler* v. *Inter-County Orthopaedic Ass'n, P.A.*, 526 F.2d 537, 542 (3rd Cir. 1975); *McGough* v. *First Arlington National Bank*, 519 F.2d 552, 555 (7th Cir. 1975); *Clark* v. *Wanchie*, 513 F.2d 994, 997 (9th Cir. 1975), *cert. denied* 423 U.S. 841 (1975); *Abramson* v. *Pennwood Investment Corp.*, 392 F.2d 759, 762 (2d Cir. 1968); and *Cream Top Creamery* v. *Dean Milk Company*, 383 F.2d 358, 363 (6th Cir. 1967); see generally *Brown* v. *Felsen*, 442 U.S. 127 (1979); *Oliver* v. *Rumford Chemical Works*, 109 U.S. 75 (1883).

The nation's leading academic authorities on this subject are also in accord. Thus, section 86 of the American Law Institute's *Restatement (Second) of Judgments* (1982) provides that:

> "A valid and final judgment of a state court has the same effects under the rules of res judicata in a subsequent action in a federal court that the judgment has by the law of the state in which the judgment was rendered, except that:
>
> (1) An adjudication of a claim in a state court does not preclude litigation in a federal court of a related federal claim based on the same transaction if the federal claim arises under a scheme of federal remedies which contemplates that the federal claim may be asserted notwithstanding the adjudication in state court; and
>
> (2) A determination of an issue by a state court does not preclude relitigation of that issue in federal court if according preclusive effect to the determination would be incompatible with a scheme of federal remedies which contemplates that the federal court may make an independent determination of the issue in question."

Section 26(1)(c), comment c, illustration (2) of this *Restatement* makes clear that federal antitrust actions are the prime example of a "federal claim aris[ing] under a scheme of federal remedies which contemplates that the federal claim may

be asserted notwithstanding the adjudication in state court." It offers the following instructive example:

> "A. Co. brings an action against B. Co. in a state court under a state antitrust law and loses on the merits. It then commences an action in a federal court upon the same facts, charging violations of the federal antitrust laws, of which the federal courts have exclusive jurisdiction. The second action is not barred."

According to these authorities (see also, e.g., *Restatement of Judgments* § 71(c)(1942)), the "implied immunity" analyzed in *Lyons*, supra, is all-controlling. Thus, even if a state court has previously determined exactly the same factual and legal issues as are presented in a subsequent exclusively federal action (a determination which is impossible in state court except in the *Lyons* situation of an affirmative defense of illegality to a state law claim), no such determination can foreclose the federal courts from redetermining *at least* the purely legal, exclusively federal issues in a subsequent exclusively federal action.

As Justice Brennan wrote in *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 674 (1978), he doubted that it could ever be appropriate to accord *res judicata* effect to a state court determination of an exclusively federal claim,

> "... for *surely* state court determinations should not disable federal courts from ruling de novo on purely legal questions surrounding such claims."
>
> (id.) (emphasis supplied)

Justice Brennan's position that at least the purely legal questions of exclusively federal law may never be foreclosed by state court determinations is supported by overwhelming authority.[12] If, therefore, a state court's ruling upon an exclusively federal legal issue may never preclude a federal court's ruling upon exactly that same issue between the same parties, then, *a*

[12] See all authorities cited under *Lyons* v. *Westinghouse Electric Corporation*, supra.

fortiori, a state court judgment may never bar an entire exclusively federal claim by claim preclusion. Regardless of whether state court findings of *fact* may have issue-preclusive effect in subsequent exclusively federal actions (*Becher* v. *Contoure Laboratories, Inc.*, 279 U.S. 388, 391-92 (1929)), if the purely legal, exclusively federal issues may not be so precluded, then the exclusively federal claim giving rise to those issues must remain.

Furthermore, in the present case, there have been no prior state court findings of either fact or federal law. Instead, the petitioners' prior state court actions were dismissed for failure to allege a claim under Illinois common law. *Treister* v. *American Academy of Orthopaedic*, 78 Ill.App.3d 746, 396 N.E.2d 1225, 1231-32 (1979). Thus, this case presents the strongest possible set of facts against the total claim preclusion of an exclusively federal action. Such a preclusion could only be upheld in this case by rejecting the holdings or logical implications of virtually all previous authority on the subject, including *Becher* v. *Contoure Laboratories, Inc.*, supra, itself.

This Court's recent unanimous decision in *Brown* v. *Felsen*, 442 U.S. 127 (1979), confirms the same point. First, that decision cautioned that claim preclusion should only be invoked "after careful inquiry" for it "may govern grounds and defenses not previously litigated," thus "blockad[ing] unexplored paths that may lead to truth." *Brown* v. *Felsen*, supra, 442 U.S. at 132. Second, it emphasized that the according of "finality" to state court "rulings" upon certain exclusively federal issues concerning dischargeability under the federal bankruptcy laws would "undercut Congress' intention to commit [such] § 17 issues to the jurisdiction of the bankruptcy court" (id., at 134-135).

Because Congress' intent in conferring exclusive jurisdiction upon the federal courts to decide such issues had been "to take these § 17 claims away from state courts that seldom dealt with the federal bankruptcy laws and to give those claims to the

bankruptcy court so that it could develop expertise in handling them" (id., at 136), the fact that Colorado's claim preclusion law would otherwise have barred the petitioner's fraud claim against the respondent debtor was not determinative. Rather, the grant of exclusive federal jurisdiction was dispositive against any such asserted claim preclusion. This consideration was controlling even though "similar" issues of state law might previously have been adjudicated in the prior state court action there concerned and might have led to far stronger remedies (e.g., punitive damages and "body execution") than the mere prevention of bankruptcy dischargeability under federal bankruptcy law (id., at 132). This same consideration was also controlling even though the prior state court action had been *settled*—a fact which is ordinarily by itself a compelling reason for preclusion (see App. A-58, citing *Wright and Miller* § 4470, at 688, and *Abramson* v. *Pennwood Investment Corp.*, supra, 392 F.2d 759 at 762).

A narrow reading of *Brown* v. *Felsen* as restricted to exclusively federal questions arising under one section of the bankrupcy laws would ignore this controlling rationale. Thus, for example, state courts also "seldom deal" (*Brown* v. *Felsen*, supra, 442 U.S. 127 at 136) with the exclusively federal *antitrust* laws, and one of the reasons that Congress conferred exclusive jurisdiction upon the federal courts over such actions was, likewise, to assure the development of the necessary "expertise in handling them" (id.). Furthermore the assured applicability of uniform federal procedural rules, administered by a single nationwide system of courts, is at least as important to the uniform and effective enforcement of national antitrust policy as it is to the enforcement of national policy in regard to the orderly relief from debts. *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 664 (1977); *Memorial Hospital for McHenry County* v. *Shadur*, 664 F.2d 1058, 1061-63 (7th Cir. 1981); *Kay* v. *Wise*, 629 F.2d 1049, 1066 (5th Cir. 1980); App. A-61.

B. The Particular Federal Interest in the Unhindered Enforcement of the Federal Antitrust Laws

This Court has repeatedly recognized the particular importance of the Sherman Act, 15 U.S.C. §§ 1 et seq., as a " 'comprehensive charter of economic liberty' " in this country's social and legal system, embodying, "together with its judicial interpretations, the fundamental rules of competitive conduct in our national market economy" (App. A-61: quoting *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958)). Thus, in *United States* v. *Topco Associates*, 405 U.S. 596, 610 (1972), this Court stated that:

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

The special importance of unhindered private enforcement of this particular exclusively federal statute by "private attorneys general" has been confirmed by Congress' grant of an exclusively federal treble damages remedy under section 4 of the Clayton Act, 15 U.S.C. § 15, which includes recovery of all costs and reasonable attorney's fees as well as, recently, special provisions for prejudgment interest (15 U.S.C. § 15(a)). Congress also recently saw fit to extend this same unique remedy to the state attorneys general in federal antitrust actions brought by them as *parens patriae* on behalf of "natural persons residing in [their] State[s]" (15 U.S.C. §15c).

In consequence of this overriding federal statutory policy in favor of private antitrust enforcement, this Court has abolished the "unclean hands" doctrine in all federal antitrust cases (*Perma Muffler* v. *International Parts Corporation*, 392 U.S. 134 (1968)) and commanded an especially favorable interpretation of even the *statute of limitations* in federal antitrust cases (*Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971)). Indeed, in *Lawlor* v. *National Screen Service Co.*,

349 U.S. 322 (1955), this Court noted that *an extension of the claim preclusion doctrine so as to bar a federal antitrust action* was "particularly" unjustified

> "... in view of the public interest in vigilant enforcement of the anti-trust laws through the instrumentality of the private treble damages action."
> (id., at 329) (*see also Wright and Miller* §§ 4415, at 131, discussing *Mercoid Corp.* v. *Mid-Continental Inv. Co.*, 320 U.S. 661, 669-70 (1944))

No such especially lenient and favorable statutory and judicial rules have been declared for any other exclusively federal actions. Thus, for example, prevailing plaintiffs in securities fraud actions brought under Rule 10b-5 as authorized by section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), are not even entitled to recover their attorney's fees from the defendants.

For these reasons, this Court may properly conclude that federal antitrust actions are the least appropriate of all the exclusively federal actions for radical extensions of the traditional federal common law doctrine of claim preclusion, that is, the doctrine that "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action" (*Federated Department Stores* v. *Moitie*, 452 U.S. 394, 398 (1981)), based upon the same "cause of action" (*Montana* v. *United States*, 440 U.S. 147, 152-53 (1979); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955)).

C. Under the "Accepted Principles of Res Judicata" as Recognized by this Court for More than One Hundred Years and by Both the *Restatements of Judgments*, the Claim Preclusion of an Exclusively Federal Claim by a Previous State Court Judgment Is Impossible, at Least When No Exclusively Federal Issues Could Have Been Raised as an Affirmative Defense.

In *Federated Department Stores* v. *Moitie*, 452 U.S. 394 (1981), this Court rejected a proposed general equitable limitation upon the doctrine of claim preclusion, holding that the established doctrine was correct and fully developed through a long series of decisions, and thus warranted a literal application according to its terms. As this Court said:

> "*There is little to be added to the doctrine of res judicata as developed in this Court.* A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been raised* in that action. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 ... (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 ... (1877)."
> (*Federated Department Stores* v. *Moitie*, supra, 452 U.S. at 398) (emphasis supplied)

Certainly, in view of this holding, there is little reason to suppose that this Court was contemplating a radical expansion of the traditional doctrine in the form of the elimination of its long-standing prior jurisdictional competency/"could have been raised" requirement. Such a change, at once revolutionizing the traditional doctrine and removing its minimal fairness protection, could scarcely be regarded as a minor "addition" (id.) to that doctrine, in keeping with the traditional analysis and approach. Thus, former Justice Stewart strongly objected to this "unprecedented result," this "highly dubious ... expansion of the doctrine of *res judicata*," in his unanswered dissent to the soon-vacated first panel decision in this case (App. B-27 to 28). Yet, only a few months prior to this Court's reaffirmation of the "accepted principles of *res judicata*" in *Federated Department Stores*, supra (452 U.S. at 398), the Fourth Circuit had made this fundamental change in *Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981), *cert. denied* 454 U.S. 878 (1981). That decision found that "irrespective of which test [of a cause of action] [was] applied and however broad or narrow the definition," it was "manifest" that there was an "identity" of causes of action between a previous state court action and a subsequent exclusively federal antitrust action. Therefore, "under established precedent," it held that the latter action was barred by claim preclusion (id.).

The basis of this startling conclusion was that the previous state court action there considered, which had been brought by a party found to be in "privity" with the plaintiff in the federal antitrust action, had involved an alleged violation of the North Carolina antitrust statute. The Fourth Circuit found that, except for the absence of an interstate commerce requirement, this state antitrust statute was "identical" to the Sherman Act in regard to its standards of liability and to the Clayton Act in regard to its remedies (id.). It cited two lower court issue preclusion decisions from the Third and Sixth Circuits,[13] three claim preclusion decisions from the Third, Fifth and Eighth Circuits, involving repeated *federal court* actions,[14] and an old, overruled Second Circuit decision[15] in support of its holding that the North Carolina and federal antitrust causes of action were also, therefore, "identical" so that the latter action was barred.

The precedential significance, for claim preclusion purposes, of the two issue preclusion decisions relied upon by *Nash* can be gathered from the fact that the two respective circuit courts subsequently rendered decisions in accordance with *Lyons* v. *Westinghouse Electric Corporation*, supra, 222 F.2d 184 (2d Cir. 1955), without so much as mentioning those lower court decisions. *Cotler* v. *Inter-County Orthopaedic Ass'n., P.A.*, supra, 526 F.2d 537, 542 (3rd Cir. 1975); *Cream Top Creamery* v. *Dean Milk Company*, supra, 383 F.2d 358, 363 (6th Cir. 1967).

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[13] *Connelly* v. *Balkwill*, 174 F.Supp. 49, 60 (N.D. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960); *Kaufman* v. *Shoenberg*, 154 F.Supp. 64, 67-68 (D. Del. 1954).

[14] *Williamson* v. *Columbia Gas & Electric Co.*, 186 F.2d 464, 467 (3rd Cir. 1950); *Engelhardt* v. *Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964); *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971).

[15] *Sinnar* v. *American Publishers' Assn.*, 201 F. 306, 310 (2d Cir. 1912).

Likewise, the Third, Fifth and Eighth Circuit precedents relied upon by the Fourth Circuit do not stand for the proposition for which they were cited. In each of those cases the previous action had been brought in or removed to *federal court* so that a federal antitrust claim could have been combined with any other federal claim (including another exclusively federal claim, as in *Williamson* v. *Columbia Gas & Electric Co.*, supra, 186 F.2d 464) or any pendent state claim. Therefore, in each of those cases the court that had rendered the previous judgment had possessed subject matter jurisdiction over the subsequent claim later held to be precluded.

The assertion in *Nash* that "[t]this [jurisdictional] difference is . . . unimportant" (*Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, supra, 640 F.2d 484 at 489) is contradicted by other case law in each of the above circuits. Thus, as has been seen, the Third Circuit categorically rejects the possibility of preclusion of exclusively federal claims as the result of previous *state court* judgments. *Cotler* v. *Inter-County Orthopaedic Ass'n., P.A.*, supra, 526 F.2d 537, 542 (3rd Cir. 1975). The Fifth Circuit also rejects the possibility of claim preclusion in that context. *Hayes* v. *Solomon*, supra, 597 F.2d 958, 984 (5th Cir. 1979). In *Engelhardt*, supra, the Eighth Circuit noted that:

> "We are not faced with the Lyons' problem here since all the earlier adjudications were made in the federal district court in actions over which the federal court had unquestioned jurisdiction. *No issue of state court decisions fettering the power of the federal court to exercise exclusive jurisdiction in federal antitrust actions is here presented.*"
>
> (*Engelhardt* v. *Bell & Howell Co.*, supra, 327 F.2d at 35) (emphasis supplied)

Furthermore, in an analogous situation, the Eighth Circuit has ruled that claim preclusion cannot apply where the first court lacks subject matter jurisdiction over the claim later said to be precluded. *Hirrill* v. *Merriweather*, 629 F.2d 490, 495 (8th Cir. 1980).

Straus v. *American Publishers' Assn.*, 201 F. 306 (2d Cir. 1912), the only other authority cited by the Fourth Circuit in support of its "identical cause of action" theory, has been overruled by *Lyons*, supra (see also, e.g., *RX Data Corp.* v. *Department of Social Services*, 684 F.2d 192, 198 (2d Cir. 1982)).

Finally, *Nash* made an extremely dubious use of this Court's many precedents concerning the federal common law doctrine of claim preclusion. Its approach to those decisions is shown by its citation of *Montana* v. *United States*, 440 U.S. 147 (1979), and *Brown* v. *Felsen*, 442 U.S. 127 (1979), for the sole proposition that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action" (*Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, supra, 640 F.2d 484 at 486). *Montana* did state that: "Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana* v. *United States*, supra, 440 U.S. 147 at 153. However, it necessarily assumed either that a "cause of action" excludes claims that "could not have been raised" in the prior action (based upon the same set of facts) or that the "could have been raised" test prevents the preclusion of any claims that are part of a "cause of action" even though they could not have been raised in the prior action. See, e.g., *Hayes* v. *Solomon*, supra, 597 F.2d 958 at 983-84. This conclusion is compelled by the many decisions of this Court that have established the "could have been raised" definition,[18] and by *Montana*'s express reliance upon one of the most famous and

[18] *Nevada* v. *United States*, ____ U.S. ____, 77 L.Ed.2d 509, 103 S. Ct. 2906 at 2918 (1983); *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 467 n.6 (1982); *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980); *Brown* v. *Felsen*, 442 U.S. 127, 131 (1978); *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 579 (1974); *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1877); *Restatement (Second) of Judgments* § 25 comment (e) (1982).

frequently cited of them, *Cromwell* v. *County of Sac*, 94 U.S. 351, 353-53 (1877). See *Montana* v. *United States*, supra, 440 U.S. 147 at 153.

In short, *Montana*'s reiteration of the "cause of action" requirement must be understood in the context of all the other statements by this Court of the prior jurisdictional competency/"could have been raised" requirement. Yet, in *Nash* the Fourth Circuit simply ignored that requirement even though it had recently been stated once again in *Brown* v. *Felsen*, supra. *Nash* cited the latter decision of this Court for the same erroneous proposition that it did *Montana* (*Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, supra, 640 F.2d 484 at 486 n.2). However, *Brown* v. *Felsen* not only repeated the "could have been raised" definition but *applied it*, in a manner directly contrary to *Nash*, by holding that an exclusively federal bankruptcy claim could not be precluded by a prior state court judgment.

The fundamental analytical error thus made by the Fourth Circuit in disregarding the traditional "could have been raised" concept is confirmed by a number of early decisions of this Court that referred to res judicata *only* in terms of the preclusion of matters that were within the "concurrent jurisdiction" of the court that rendered the previous judgment. *Johnson Steel Street Rail Co.* v. *Wharton*, 152 U.S. 252, 257-58 (1894); *Lessee of Parrish* v. *Ferris*, 67 U.S. (2 Black) 606, 609 (1863); *Stockton* v. *Ford*, 59 U.S. (18 How.) 418-19 (1856); *Pennington* v. *Gibson*, 57 U.S. (16 How.) 65, 77-78 (1853). See 46 Am. Jur. 2d *Judgments* §§ 394, 446 (1969). Obviously, all these authorities are consistent with the traditional "could have been raised" concept; obviously, too, they are all hopelessly irreconcilable with the Fourth Circuit's attempt to read that concept out of the federal common law.

Furthermore, in *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261 (1980), this Court reaffirmed this long-standing prior

jurisdictional competency limitation upon the scope of claim preclusion. In that decision, it held that:

> "A traditional application of res judicata principles enables either party [to a prior litigation between the same parties] to claim the benefit of the judgment *insofar as it resolved issues the court had jurisdiction to decide* . . . . In this case, the Virginia Commission could and did establish the full measure of petitioner's rights under Virginia law, *but it neither could nor purported to determine his rights under the law of the District of Columbia.* Full faith and credit must be given to the determination that the Virginia Commission had the authority to make; but by a parity of reasoning, *full faith and credit need not be given to determinations that it had no power to make.*" (id., at 282-283) (emphasis supplied)

If the constitutional command of Full Faith and Credit as among the states cannot extend to claims that are beyond the jurisdictional competency of the courts of the judgment-rendering state, then, *a fortiori*, the "accepted principles of res judicata" cannot require a federal court to dismiss an exclusively federal claim on the basis of a prior state court judgment, at least in a situation such as this in which no exclusively federal issue could possibly have been raised in the previous state court action. Also, necessarily, what even this constitutional obligation cannot require, the Full Faith and Credit Statute cannot require. Hence, *Thomas* v. *Washington Gas Light Co.*, supra, is persuasive authority for the existence of a general "implied exception" to 28 U.S.C. § 1738 requiring the *nonpreclusion* of any exclusively federal action by a previous state court action (at least except in the *Lyons* situation), regardless of the controlling effect of state claim preclusion and issue preclusion principles in all other cases.

In support of its holding in *Thomas*, this Court cited one of the sections of the *Restatement (Second) of Judgments*, supra, which make clear that any supposed claim preclusion of an exclusively federal claim by means of a state court judgment is

a logical absurdity—an error of definition and analysis. *Thomas* v. *Washington Gas Light Co.*, supra, 448 U.S. 261 at 283 n.29. The reasoning of this *Restatement*, which confirms the fair and sensible approach of the common law as summarized in § 71(c) of the first *Restatement of Judgments* (1942), is the only correct application of the "accepted principles of res judicata." This was the unanimous view of the Fifth Circuit in banc in *Nilsen* v. *City of Moss Point, Miss.*, 701 F.2d 556,560,564 (5th Cir. 1983), and of the Second Circuit in *RX Data Corp.* v. *Department of Social Services*, 684 F.2d 192, 198 2d Cir. 1982). As this Court concluded in *United States* v. *Utah Constr. & Min. Co.*, 384 U.S. 394 (1966) at 419 n. 15:

> "Of course, if the findings made by the Board are not relevant to a dispute over which it has jurisdiction, such findings would have no finality whatsoever."

In rejecting this view, without even mentioning *Thomas*, supra, much less, the centuries-old "could have been raised" limitation upon the doctrine of claim preclusion, the Fourth Circuit fell into clear error in *Nash*. That error led, in turn, to the similar errors of the Ninth Circuit in *Derish* v. *San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347 (1983), and of the Seventh Circuit in the present case, in ignoring this elemental fairness requirement of the traditional doctrine. This Court should specifically reject this line of mistaken decisions. It should limit *Nash* to at most the narrowest factual ground upon which it might have been decided, namely, an estoppel by settlement (App. A-58; but see *Brown* v. *Felsen* 442 U.S. 127 (1979), in which this Court did not consider even a prior settlement between the parties to be a significant factor in favor of claim preclusion, as opposed to the controlling factor of exclusive federal jurisdiction).

Any other outcome would pose a substantial issue of the denial of due process of law. For a court to invoke claim preclusion to bar a proper and timely claim that would not have been barred under the applicable claim preclusion principles at

the time of the previous action, and when even the *future possibility* of such preclusion could not reasonably have been foreseen, is for it to refuse to perform its basic function for no reason at all. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); Casad, *Interystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 Cornell L. Rev. 510, 516-17 (1981); Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 327 (1978). As Judge Cudahy observed in his dissent to the decision below:

> "This is judicial activism in the service of judicial abdication .... With all respect, I am afraid we are simply refusing to do our job as federal judges in circumstances where the well-accepted rules plainly require us to do it."
>
> (App. A-49)

Here, to repeat, a federal court has relied upon a novel misreading of the established common law doctrine of claim preclusion in order to dismiss an exclusively federal claim that could only be brought in federal court. Probably, the unfairness of such preclusion in *Nash* was not of a constitutional dimension, because of the settlement of the previous state antitrust action there concerned and because of the "identical" nature of the subsequent federal action. Moreover, after *Nash* the result in *Dorish* could not, at least, have been totally *unforeseeable*. However, these petitioners never brought a state antitrust action; their previous state court actions were based upon Illinois' common law. Nor did they settle those actions, which were, instead, dismissed at the outset for failure to allege a claim under that body of law. They have never had their "day in court." Thus, the Seventh Circuit's decision to deny them any opportunity for a hearing upon their exclusively federal claims is so unfair as to violate their right to due process of law. Certainly, at the time that the petitioners brought their state common law actions in the state courts, no reasonable person would have imagined, much less, foreseen, that those

actions could later be found to bar, by claim preclusion, any subsequent exclusively federal action that they might possibly have been able to bring in federal court, based upon the same "basic set of facts."

Furthermore, a plaintiff has a constitutional right to bring an action under the laws of his own state in the courts of his own state. See *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U.S. 230, 233 (1934), and *Blake* v. *McClung*, 172 U.S. 239, 248-49 (1898), holding that the right to bring suit in the courts of *another* state is a constitutionally protected "privilege and immunity." As former Justice Potter Stewart remarked in his dissent to the first panel decision of this case: "This expansion of the doctrine of res judicata contradicts the principle, fundamental to our legal system, that parties, not judges, choose the forum in which to resolve their differences and frame the claims advanced in their pleadings." (App. B-27) Thus, the counterargument that due process is not denied so long as there was the initial possibility of bringing the entire action in federal court is unavailing. Such a waiver of the constitutional right to choose a state court forum as a condition of the exercise of the federal statutory right—not privilege—to bring an exclusively federal claim constitutes, on its face, an "unconstitutional condition." See, e.g., *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Speiser* v. *Randall*, 357 U.S. 513 (1958).

At the least, any claim preclusion in the circumstances of this case, in which the principal state court claims of both petitioners were based upon state common law, would violate basic considerations of comity and federalism that go beyond even the mandate of the Full Faith and Credit Statute.[17]

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[17] *Younger* v. *Harris*, supra, 401 U.S. 37, 44 (1971). See also *Kremer* v. *Chemical Construction Corp.*, supra, 456 U.S. 461, 478 (1982); *Moore* v. *Sims*, 442 U.S. 415 (1979); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

Finally, those same considerations support a powerful efficiency argument *against* claim preclusion. If exclusively federal claims can be lost through the exercise of the constitutional right to bring state law claims in state court, then almost all parties with exclusively federal claims will bring them first in federal court, and include as many of their state law claims as possible within the federal court's pendent jurisdiction. The Seventh Circuit has recently made clear that in such cases "any doubts [must be] resolved in *favor of joinder.*" *Harper Plastics, Inc.* v. *Amoco Chemicals Corp.*, 657 F.2d 939, 946 (7th Cir. 1981). Thus, the Seventh Circuit's present approach can only add greatly to the burdens of the federal courts. It will also place the burden of deciding many complex state law issues upon those courts where it least belongs. This compulsion upon plaintiffs to choose the wrong forum for their state law claims is an insoluble dilemma of the *Nash/Derish* approach to the question of claim preclusion in the context of exclusive federal jurisdiction, let alone the radical approach of the present decision. Even if for that reason alone, such an approach must be rejected. *Wright and Miller* § 4470.

D. Judge Flaum's Novel Laches Limitation Upon Federal Antitrust Enforcement, Under the Name of Claim Preclusion, Is Unworkable, Unfair and Contrary to this Court's Decisions in *Federated Department Stores* and *Perma Muffler*.

Brown v. *Felsen*, supra, and *Federated Department Stores*, supra, are by themselves sufficient to dispose of Judge Flaum's unfair, unworkable so-called "extension" of "the more confined and dated interpretations of *res judicata*" (App. A-32). If special equitable exceptions to the "accepted principles" of the basic doctrine are unacceptable for the sake of allowing proper claims, they cannot be acceptable for the purpose of precluding them. *Brown* v. *Felsen*, 442 U.S. 127, 132 (1979). Any such lopsided approval of exceptions could only enlarge the "shield [for] the fraud and the cheat" (id.) and, in this case, ignore the

fundamental inequity of denying these petitioners any day in court with respect to their antitrust claims.

Not only is Judge Flaum's perception of the equities of this case strangely mistaken, and, in any event, irrelevant under this Court's two above-mentioned decisions, but his proposed compromise solution is unworkable. First, the law of claim preclusion would be thrown into utmost confusion if district courts were required to determine, in every instance, what "reasonable period of time" might elapse between the *filing* of a state court action and the *filing* of an exclusively federal action in federal court before an eventual final judgment on the merits by the state court could bar the parallel, exclusively federal action (App. A-30 to 32). Second, if the parallel federal action were decided first, it would automatically preclude the state court action. *Harper Plastics, Inc.* v. *Amoco Chemicals Corp.*, *supra*, 657 F.2d 939 (7th Cir. 1981). Third, as Judge Flaum partially acknowledged (App. A-31 to 32 at n. 6), but did not fully analyze, section 2-619(a)(3) of the Illinois Code of Civil Procedure (Ill.Rev.Stat., 1982, ch. 110, ¶ 2-619(a)(3)) poses an awkward embarrassment for his split-action approach. It provides that the existence of "another action pending between the same parties for the same cause" *is a ground for dismissal of an Illinois court action.*

If, as Judge Flaum believes, an exclusively federal action is the same cause of action as any state court action so long as it arises from the same basic set of facts, then the Illinois courts could never decide the state law issues; there would be an automatic, not merely an effective, compulsion to bring them in federal court, without even the limitation of the *Nash/Derish* antitrust "identity" principle. If, on the other hand, the causes of action are not the same, then there would be no conceivable reason to *require* the plaintiff to bring two actions instead of one.

More fundamentally, though, this novel distortion of the laches doctrine cannot be reconciled with *Zenith Radio Corp.* v.

Hazeltine Research, Inc., supra, 401 U.S. 321 (1971), or *Perma Muffler* v. *International Parts Corporation*, 393 U.S. 134 (1968). Like the plurality's erstwhile theory of waiver through "forum selection" or "election of remedies," it falls between the rock of federal antitrust enforcement policy and the hard place of this Court's declared insistence upon caution and certainty in applying the "accepted principles of res judicata." *Federated Department Stores* v. *Moitie*, supra, 452 U.S. 394 at 398; *Brown* v. *Felsen*, supra, 442 U.S. 127 at 132.

III

EVEN ON THE CLAIM PRECLUSION ASSUMPTIONS OF *NASH, DERISH* AND THE PLURALITY OPINION, THE SEVENTH CIRCUIT'S DECISION MUST BE REVERSED BECAUSE OF THE PLURALITY'S ERRONEOUS APPROACH TO DETERMINING THE "MATERIAL IDENTITY" OF THE HYPOTHETICAL CORRESPONDING STATE AND FEDERAL CLAIMS.

Even on the Plurality Opinion's own erroneous assumptions about the federal claim preclusion doctrine in the context of the Full Faith and Credit Statute, the result that it reached was utterly unprecedented and illogical. Thus, even if this Court should decide to use this case to alter fundamentally the "accepted principles of res judicata," the Plurality Opinion would still have to be rejected as a conspicuous example of how *not* to go about determining the "identity" of state and federal antitrust causes of action.

A. Comparative Standards of Liability

First, it is essential to note that none of the antitrust offenses here charged could be judged by a per se standard under the Illinois Antitrust Act without proof of a *price-fixing* conspiracy. The Amended Complaint alleges a nationwide conspiracy by the members of the respondent to deter a variety of procompetitive trade practices through the arbitrary control

that they exercise over all actual and potential applicants.[9] It alleges that in Dr. Treister's case in particular, this conspiracy sought to *limit the output* of expert medical malpractice testimony for plaintiffs.

The Plurality Opinion acknowledged that under federal antitrust law any output-limitation conspiracy constitutes a per se violation (App. A-9 to 10). However, it misconstrued section 3(1)(b) of the Illinois Antitrust Act as an identical per se prohibition (id.). In fact, this provision only applies to those output-limitation conspiracies which are proven to have the purpose or effect of price-fixing. See Ill. Rev. Stat., 1981, ch. 38, § 60-3(1)(b), reproduced at App. U-8 to 9. Therefore, if the alleged conspiracy to deter expert testimony for plaintiffs in medical malpractice cases does constitute a form of output-limitation conspiracy, then the Plurality Opinion's analysis of this aspect of the comparative liability issue was necessarily in error.

Furthermore, having made this clear error of law in misconstruing section 3(1)(b) of the Illinois statute, the plurality compounded its error by holding that there was no possible significance to the fact that, under section 3(2) of the same statute, *all group boycotts must be judged according to the Rule of Reason* (App. A-9 to 10). In this respect its error was the converse of the one concerning section 3(1)(b); although its interpretation of section 3(2) of the Illinois statute was correct, its approach to the question whether the applicable rules of federal antitrust law could possibly be different, so as to destroy the hypothesized "identity" of the state and federal antitrust standards, was radically flawed.

This error of application of the *Nash/Derish* "identity" analysis was inherent in the plurality's assertion that

> "... a nonprice conspiracy to exclude rivals from a professional association [must] ... *under our precedents* ... be tested under the Rule of Reason."
> (App. A-10) (emphasis supplied)

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[9] Joint App. 21-30.

First, this characterization of the Amended Complaint ignored both the alleged *purposes* of the "nonprice conspiracy" (namely, to coerce the trade practices of competitors) and the alleged *procedural arbitrariness* of the "professional association's" entire admissions system. Second, the plurality's reliance upon two recent Seventh Circuit precedents, neither of which concerned such alleged anticompetitive purposes or procedures,[9] *without any consideration of the antitrust decisions of this Court*, can only be regarded as the *prejudgment of the merits* which the dissenters so severely criticized (App. A-34, 65-66). If there is any significant possibility under this Court's precedents that an alleged antitrust violation might be judged under a per se standard, then there must also be such a possibility under the precedents of the Seventh Circuit because this Court's antitrust law is necessarily incorporated into the law of that lower court.

The Seventh Circuit could not reasonably have concluded under, e.g., *Arizona* v. *Maricopa County Medical Soc.*, 457 U.S. 332 (1982), and *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), that the respondent "professional association" was entitled to immunity from the per se rules.[10] Therefore, the Seventh Circuit also could not

[9] *Wilk* v. *American Medical Ass'n*, 719 F.2d 207 (7th Cir. 1983), in fact clearly recognized that group boycotts to coerce competitors' trade practices are per se illegal. It noted that the situation there concerned was *not one* "in which the medical doctors [were] alleged to have combined to boycott chiropractors in an attempt to coerce the chiropractors to behave in a certain economic manner, such as pricing" (id., at 218), and therefore applied a modified Rule of Reason standard.

United States Trotting Ass'n v. *Chicago Downs Ass'n*, 665 F.2d 781 (7th Cir. 1981), which was the *only other authority* cited by the plurality on this point, did not even remotely concern the issue of **such anticompetitive intent.**

[10] *See Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, ____ U.S. ____, 80 L.Ed. 2d 2, 104 S.Ct. 1551 at 1556 n.12 and 1565 n.42 (1984).

reasonably have concluded that there was no possibility of the petitioners establishing the respondent's per se liability under, e.g., *Assoc. Gen. Contractors of Cal.* v. *Cal. St. Council*, ____ U.S. ____, 74 L.Ed. 2d 723, 733, 103 S.Ct. 897, 903-04 (1983); *McClain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 243 (1980); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's Inc.* v. *Broadway Hale Stores*, 359 U.S. 207 (1959); *American Medical Ass'n* v. *United States*, 317 U.S. 519 (1943); and *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457 (1941). *See generally Report of the Attorney General's National Committee to Study the Antitrust Laws* at 133 (1955).

No inquiry into the substantive antitrust merits of this case is necessary in order for this Court to find that the Seventh Circuit's refusal to consider the possible relevance of any of these controlling precedents, in the context of any of the present allegations about coercive, anticompetitive purposes accomplished through an arbitrary admissions system, was in error. It departed from any proper inquiry into the possible differences in the applicable state and federal standards of liability.

B. Comparative Damages Remedies

The plurality conceded that the petitioners could only have obtained treble damages under the Illinois Antitrust Act if they had been able to prove a "willful" violation, and even then only if they could have persuaded the state court "in its discretion" to increase the actual damages "up to" that maximum amount. Ill. Rev. Stat., 1981, ch. 38, § 60-7(2) (App. U-10 to 12); App. A-10. By contrast, section 4 of the Clayton Act (15 U.S.C. § 15) automatically entitles a prevailing plaintiff to recover treble damages. Yet, the plurality was undeterred by even this critically important distinction between the state and federal statutes because, it supposed, "the [petitioners] do not care about treble damages" (App.A-11).

As the dissenters to this decision aptly observed in response to this particular abuse of the "tracking" technique:

> "This sort of speculation (or second-guessing) about the plaintiffs and their thoughts and intentions is so conjectural as to resemble more a flight of fancy than an exploration of fact. It would be manifestly impractical for us to guess in every case, for example, whether or not the plaintiffs 'really' needed or 'really' sought damages as a basis for determining whether their state action should preclude their federal action. This is surely not the path to certainty in the law . . . ."
>
> (App. A-65).

Not only was the plurality's approach on this point inherently speculative and illogical but it also lost sight of the purpose of the inquiry, which was supposedly to determine whether the Illinois Antitrust Act was intrinsically so similar to the Sherman and Clayton Acts that a "cause of action" under it could substitute for a "cause of action" under those exclusively federal statutes. Thus, in delving unexpectedly into the petitioners' supposed thoughts and feelings of seven years beforehand, at the time of their state court actions, the Plurality Opinion contradicted its own basic premise. The only reason that it could propose to bar these petitioners from raising this exclusively federal claim in federal court was the supposed "material identity" of their potentially available state and federal antitrust causes of action; yet, being faced with the lack of any such identity here, the plurality abruptly shifted its inquiry back to the minutest details of the *actual* previous claims that had been brought.

Finally, the plurality's improper speculations about the petitioners' motives were also inherently unlikely. Thus, the failure of the petitioners to bring a state antitrust action under such an unfavorable statute as Illinois' scarcely shows that they had no interest in recovering damages for their exclusion. Also, it was simply illogical for the plurality to disregard the millions of dollars of actual and punitive damages that the petitioners had sought with respect to the *other counts* of their previous state court actions—those which were not based upon the

theory of a deprivation of common law associational rights—and to assume that, if an assured right to treble damages (plus costs and attorney's fees) had been available with respect to their associational rights counts, it would not have been pursued.

The proof of damages resulting from an associational exclusion that has not destroyed an injured competitor's business is difficult, requiring expert, expensive economic analysis and development. The same could be said about the proof of damages and liability in almost every antitrust case. This is, in fact, one of the principal reasons for Congress' decision to encourage such proof by the incentive of treble damages (and the recovery of all costs and reasonable attorney's fees). The best proof of the importance of such damages to these petitioners is that, at the outset of this action, long before the plurality's musings about their state of mind in 1976, they demanded millions of dollars in treble damages. Contrary to the plurality's illogical conjectures, they do indeed "really want" to collect those damages.

IV

THE EXTENSION OF THE *NASH/DERISH* APPROACH TO CASES IN WHICH NO PREVIOUS STATE ANTITRUST CLAIM HAS BEEN BROUGHT IN STATE COURT WOULD CURTAIL PRIVATE AND PUBLIC ANTITRUST ENFORCEMENT AND AGGRAVATE THE INHERENT COMITY, FEDERALISM AND EFFICIENCY OBJECTIONS TO THAT APPROACH.

Although the traditional definition of the claim preclusion doctrine has looked to those claims or issues which "might have been raised" in the previous action, if this Court should now alter that definition by adopting the "identity" analysis of *Nash* and *Derish*, it should at least impose a fair and prudent limitation upon that innovation. It should not permit the claim preclusion of exclusively federal claims, and in particular federal antitrust claims, by prior state court judgments unless

the corresponding "identical" claims *have in fact been made and determined in state court*, as was true in both *Nash* and *Derish* but not in the present case. Otherwise, the most serious adverse consequences will ensue, both for antitrust enforcement in general and for the proper and efficient allocation of the functions of the state and federal courts.

First, although profound objections can be made to the *Nash/Derish* approach on the grounds of comity and federalism, those objections are insuperable in the case of the Seventh Circuit's radical new extension of that approach to state court actions having nothing to do with the antitrust laws. In addition to the other grave constitutional concerns that have previously been discussed, it is apparent that a doctrine of waiver of exclusively federal claims *whenever* a plaintiff brings an action in the state courts would result in an unheard-of intrusion by the federal courts into the states' traditional governmental function of deciding legal disputes. *National League of Cities* v. *Usery*, 426 U.S. 833, 855 (1976).

Moreover, the Seventh Circuit's "material identity" limitation upon this distortion of the traditional claim preclusion doctrine, whereby the revamped doctrine would only be invoked when the relief provided by state law is at least as extensive (in terms of both liability and damages) as that provided by the corresponding exclusively federal law, is scarcely a limitation at all. Its paradoxical effect would be to *discourage* the states from bringing their antitrust, securities fraud and other statutes with exclusively federal counterparts into conformity with the federal standards, so that their citizens could at least be assured of the unhindered right to resolve legal disputes in the local courts.

From the federal courts' standpoint, too, the Seventh Circuit's extreme approach could only lead to an unwelcome proliferation of claims that are now routinely decided by the state courts. The most efficient federal procedure for dealing with exclusively federal claims is the traditional approach of

permitting all other claims, including claims over which the state courts have concurrent jurisdiction, to be litigated in state court, and then permitting any remaining exclusively federal claims to be litigated in their proper forum.

However, even such considerable efficiency interests are as nothing compared with the federal interest in vigorous antitrust enforcement. That overriding interest requires that these federal antitrust plaintiffs have at least one day in court on their antitrust claims.

Furthermore, the ordinary difficulty of detecting and proving antitrust violations militates in favor of only the most cautious extensions (if any) of the claim preclusion doctrine in this area. Where a state antitrust action has already been brought under an "identical" state statute such as in *Nash* or *Derish*, the public policy concern about an unwise application of the transactional test of a common cause of action under federal common law is largely satisfied. In any such case, the federal court is assured that, if nothing else, the difficulty of discovering an antitrust violation has not been the cause of the previous failure to bring the federal action.

On the other hand, where no previous state antitrust action has been brought, it is reasonable to assume that not all the facts later alleged in the federal antitrust action were known or readily knowable by the plaintiff at the time of the previous action. Such an assumption would be fully consistent with the facts of most such cases of initial unrelated actions in the state courts. To the extent that this assumption might not always apply simply for that reason, it should nevertheless always be applied so as to protect and enhance private antitrust enforcement and to avoid turning every claim preclusion decision into another sort of "tracking" expedition primarily concerned with determining how much the federal antitrust plaintiff "really" knew and when.

The impossibility of limiting the Plurality Opinion's approach only to private, nongovernmental plaintiffs or to

federal antitrust plaintiffs who or which had also been the plaintiffs in state court, must also be considered.

First, as *Nash* makes clear, the standards of governmental privity for claim preclusion purposes, at least under the federal common law of claim preclusion, are extremely broad. In light of these standards, if this Court should now approve the approach of the Plurality Opinion, it would be extremely difficult for any state agency to sue a particular defendant for *anything* without thereby necessarily precluding a subsequent federal antitrust action by any other state agency or "privy" against that same defendant, arising from the same "basic set of facts." The respondent's empty protestations that this case does not presently involve a state agency do not address this major antitrust enforcement problem created by the Plurality Opinion, especially in view of the likelihood that the previous governmental lawsuit would not have sought damages, thus rendering even the absence of a treble damages remedy under the state antitrust law "irrelevant" according to the plurality's analysis.

Second, as Professor Currie's article, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317 (1978), makes clear, there is far better reason to invoke the claim preclusion doctrine against a previous state court defendant who or which has waived or lost a federal antitrust defense in state court before bringing a federal antitrust action against the state court plaintiff, than there is to invoke that doctrine here (id., at 347-48; see also *Turf Paradise, Inc.*, v. *Arizona Downs*, 670 F. 2d 813, 821 n.6 (9th Cir. 1982). Yet, for the reasons so powerfully expounded by Judge Learned Hand in *Lyons* v. *Westinghouse Electric Corporation*, supra, 222 F. 2d 184, this Court should not permit the claim preclusion of *any* federal antitrust actions by state court judgments, even in the context of such "common law compulsory counterclaims." *Restatement (Second) of Judgments* § 25 (1982). Again, on this point, the respondent's insistence that the problem is not immediately before this Court does not explain how that problem can subsequently be avoided if this Court accepts the rationale and approach of the

Plurality Opinion. Instead, this Court should confirm that the true interpretation of decisions such as *Lektro-Vend Corp.* v. *Vendo Co.*, supra, 660 F.2d 255, 274 (7th Cir. 1981), is that the right to a federal forum, no less than the right to a state forum, is such an important policy interest in the context of exclusive federal jurisdiction that it overrides any conflicting state law rules of preclusion.

V

BECAUSE THE DECISION OF THE CRIMINAL CONTEMPT APPEAL WAS BASED UPON THE DECISION OF THE CLAIM PRECLUSION APPEAL, BOTH JUDGMENTS MUST BE REVERSED.

As this Court correctly perceived in limiting its review in this case to the first three Questions Presented, there is no need for it to review the plurality's remarks about a First Amendment "interest" in additional discovery protections that the respondent neither desired nor sought, in order to reverse both decisions of these consolidated appeals. The *holding* of the Seventh Circuit in reversing the criminal contempt judgment was that it "fell with the case" (App. A-15 to 16, 23). Therefore, this Court should not condone the plurality's disregard of the well settled rule that the federal courts may not render unnecessary constitutional opinions. *Jackson* v. *Virginia*, 443 U.S. 307, 327 (1979); *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936). Nor should it assume that, with the claim preclusion foundation of the criminal contempt decision removed, the plurality would have been nearly so quick to reverse the district court on the basis of arguments that the respondent never made to the latter. See, e.g., *Turner* v. *City of Memphis*, 369 U.S. 350 (1962); *but see* App. A-39, 41.

In the final analysis, the plurality's unprecedented bestowal of a First Amendment "interest" in the membership files of national professional associations—but not "trade" associations (App. A-18)—merely confirms the wisdom of these traditional principles of appellate restraint that the plurality abandoned.

CONCLUSION

For the foregoing reasons, the petitioners, Drs. Marrese and Treister, hereby respectfully submit that the Seventh Circuit's claim preclusion decision and criminal contempt decision in the case now before this Court should be reversed.

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JOINT

APPENDIX

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No. 83-1492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

R. ANTHONY MARRESE and MICHAEL R. TREISTER,

Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 2, 1984
CERTIORARI GRANTED JUNE 25, 1984

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[Pursuant to Rule 30.1, the following documents, which have already been reproduced in the Appendix to the Joint Petition for a Writ of Certiorari in this case ("Appendix"), are hereby incorporated by reference in chronological order: District Court's September 3, 1980, Claim Preclusion Decision (App. E); District Court's August 17, 1981, Claim Preclusion Decision (App. F); District Court's October 5, 1981, Claim Preclusion Decision (App. G); District Court's October 14, 1981, Claim Preclusion Decision (App. H); Seventh Circuit's November 4, 1982, Decision (Vacated) (App. B); Seventh Circuit's May 11, 1983, Decision (Vacated) (App. C); District Court's September 14, 1983, Certification Decision (App. I); Seventh Circuit's September 16, 1983, Certification Decision (App. J); Seventh Circuit's January 3, 1984, Decision, as Amended (App. A); Seventh Circuit's January 3, 1984, Judgment Order (App. O). Appendix U, which includes the required copies of various relevant statutory provisions too lengthy to be reproduced in the body of the previous petition or the briefs on the merits, is also likewise incorporated herein by reference.

The decision of the Illinois Appellate Court, First District, in *Trister* v. *American Academy of Orthopaedic*, 78 Ill. App. 3d 746, 396 N.E.2d 1223 (1979), which is Exhibit "C" to the respondent's Motion to Dismiss the Amended Complaint, has been omitted from this Joint Appendix by agreement of the parties and the Office of the Clerk. Forty (40) copies of the report of that decision at 396 N.E.2d 1223 et seq. have been lodged with the Office of the Clerk.]

No. 83-1452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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Petitioners,

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

No. 83-1452

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OCTOBER TERM, 1983

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Relevant Docket Entries

1.	Complaint Filed	(March 24, 1980: R. 1)
2.	Defendant's Motion to Dismiss Filed	(April 17, 1980: R. 4)
3.	Plaintiffs' Motion for Leave to File Amended Complaint Granted; Defendant's Motion to Dismiss the Original Complaint to Stand as Motion to Dismiss the Amended Complaint	(June 19, 1980: R. 12)

4. Corrected Amended Complaint Filed (June 19, 1980: R. 11)
5. Motion to Dismiss Denied (September 3, 1980: R. 20 (2nd))
6. Defendant's Answer Filed (October 6, 1980: R. 32)
7. District Court's Opinion and Order on Reconsideration of Claim Preclusion Decision of September 3, 1980 (August 17, 1981: R. 171)
8. District Court's Denial of Defendant's Motion for Reconsideration of August 17, 1981, Opinion and Order (October 5, 1981: R. 206)
9. Defendant's Notice of Appeal re Orders of September 3, 1980, August 17, 1981, and October 5, 1981, Filed (Case No. 81-2671) (October 13, 1981: R. 209)
10. District Court's Supplement to and Clarification of October 5, 1981, Memorandum and Order Denying Reconsideration (October 14, 1981: R. 208)
11. Seventh Circuit's First Panel Decision in Case No. 81-2671 (November 4, 1982)
12. Seventh Circuit's Second Panel Decision in Case No. 81-2671 (May 11, 1983)
13. District Court's Memorandum and Order Amending October 5, 1981, Order Denying Reconsideration (September 14, 1983)

14. Seventh Circuit's Order Granting Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) (September 16, 1983)
15. Seventh Circuit's In Banc Decision in Case Nos. 81-2671 and 83-2683 (January 3, 1984)
16. Seventh Circuit's Order Denying as Moot Appellees' Motion to Stay Mandate in Case Nos. 81-2671 and 83-2683 (July 2, 1984)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M. D. and MICHAEL R. TREISTER, M. D.,	)	
Co-Plaintiffs,	)	
-vs-	)	No. 00 C 1405
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

AMENDED COMPLAINT

Come now R. Anthony Marrese, M.D., and Michael R. Treister, M.D., Co-Plaintiffs, by their attorneys, Glenn A. Schwartz and Charlotte W. Ziporyn, and Stephen B. Cohen, William J. Stevens, Joseph Schuman and Michael T. Sawyier, and complaining of Defendant, American Academy of Orthopaedic Surgeons, and demanding trial by jury allege as follows:

COUNT I
JURISDICTION AND VENUE

1. Jurisdiction of this Action is conferred upon this Court by 28 U.S.C. §1337. This Action arises under Sections 4 and 16 of the Clayton Act of 1914, 15 U.S.C. §§15, 26, as hereinafter more fully appears. The Plaintiffs seek to recover treble the amount of damages caused by Defendant's violations of Section 1 of the Sherman Act, 15 U.S.C. §1, and to prevent and restrain such violations.

2. The Defendant, American Academy of Orthopaedic Surgeons (hereinafter the "Academy"), is a not-for-profit corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business at 444 North Michigan Avenue, Chicago, Illinois, in this District and Division.

3. The Academy is engaged in inter-

state commerce in, among other things, the providing of nationwide informational, educational and other associational services to its members, who comprise the great majority of those physicians throughout the United States who are certified by the American Board of Orthopaedic Surgery and who have engaged in the exclusive practice of orthopaedic surgery for a minimum period of three years following the completion of their formal training. Its membership includes residents of all fifty states and Canada.

4. Most or all of the Academy's active United States members derive a substantial portion of their income, directly or indirectly, from the surgical fees charged to patients insured under the federal programs commonly known as Medicare and Medicaid. The total fees charges, directly or indirectly, by said members for said services

greatly exceed the sum of FIVE HUNDRED MILLION DOLLARS ($500,000,000) per year.

5. The total fees charged directly or indirectly by Plaintiffs, who have been denied admission to the Academy, with respect to their own patients who are insured under the above federal programs, exceed the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000) per year.

6. Applications for fellowship in the Academy are received and processed on a nationwide basis, with the names of all applicants included on lists that are distributed by Defendant to its members throughout the United States accompanied by a request for information pertaining to the reputation and qualifications of the persons so listed. Said information is then considered by the Regional Admissions Committees and the Board of Directors of the Academy, which committees and board

are themselves drawn from the nationwide membership, in deciding whether to grant or deny the membership applications. All such decisions supposedly conform to the By-Laws of the Academy, which apply throughout the United States.

DESCRIPTION OF THE PARTIES

7. Plaintiffs, Dr. Marrese and Dr. Treister, are orthopaedic surgeons duly licensed to practice medicine and surgery and presently practicing orthopaedic surgery in the States of Indiana and Illinois, respectively. Since 1974 each has been certified and has remained certified by the American Board of Orthopaedic Surgery.

8. Defendant, Academy, is the sole generally recognized organization of its kind in the orthopaedic surgical profession and freely holds itself out to be such. It is closely affiliated with the American Medical Association, which officially re-

cognizes the Academy as the spokesman for all orthopaedists.

9. In turn, although the American Board of Orthopaedic Surgery (ABOS) certifies orthopaedic surgeons, the Academy was largely responsible for the formation of that certifying body and continues to be intimately involved with it through, among other things, interlocking boards of directors. All members of the board of directors of ABOS are also present or past members of the board of the Academy, and the Academy is empowered by the ABOS to nominate the candidates for the latter's board.

10. The Academy is, in a word, a monopoly in its field, possessed of substantial power to control the market for orthopaedic surgical services, especially by denying access to any of the various subspecialty organizations of the practice.

10A. On information and belief, membership in the Academy is a requirement for membership in most of the above subspecialty organizations including, among others, the American Orthopaedic Foot Society and the American Orthopaedic Society for Sports Medicine.

11. Active fellowship in the Academy is a factor relied upon by hospitals in the granting of orthopaedic surgical privileges, by physicians in making referrals of patients' cases, by insurance companies in the setting of malpractice insurance premiums, by courts and other adjudicative panels in determining the expertise of orthopaedic surgeons whose testimony is offered as expert witnesses, and by aspiring orthopaedic surgeons choosing a clinic in which to practice.

11A. Members enjoy significant competitive advantages over nonmembers in regard to advancement, and particularly

sustained, long-term advancement, in the orthopaedic surgical profession.

12. Conversely, rejection for Academy membership, which must be disclosed to hospitals where staff privileges are sought, to insure companies whose liability coverage is sought, to other professional societies to which admission is sought, and to any court or similar authority in response to questions about an expert witness's qualifications, is a subject of suspicion and disgrace.

13. Both Plaintiffs have been repeatedly subjected to such suspicion and disgrace as hereinafter more fully appears.

DR. TREISTER'S APPLICATION

14. In November of 1974, Plaintiff Treister applied for membership in the Academy by submitting an application form. A copy of a blank application form is attached to this Complaint as Exhibit A and

incorporated herein by reference.

15. On information and belief, after the above application, the Academy prepared a list of applicants for Active Fellowship, designated as such, which list included Dr. Treister. This list was broadly distributed to physicians throughout the United States, accompanied by a request for information concerning the reputation and qualifications of all the persons so named.

16. In January 1976, Plaintiff Treister received a notice stating that Dr. Louis W. Kolb, a member of the cognizant Regional Admissions Committee, would interview him as part of the processing of his application.

17. When the above interview took place, Dr. Kolb informed Dr. Treister that there was adverse information in Plaintiff's file which Dr. Kolb predicted would cause the application to be rejected.

18. Dr. Kolb informed Dr. Treister that the above adverse information generally concerned his supposed "improper" testimony in a medical malpractice case and his paid assistance, during his period of residency, of another orthopaedic surgeon in his private orthopaedic practice.

19. Dr. Treister replied to Dr. Kolb as specifically as he could, given the general nature of the above charges, stating that the charge of "improper" testimony was false and that the charge concerning his outside practice was irrelevant, in that the conduct alleged was not a violation of any ethical standard but was instead standard practice among Active Fellows of the Academy and was performed with the knowledge and consent and under the guidance of at least one such Active Fellow.

20. Dr. Treister asked Dr. Kolb to let him see the file. Dr. Kolb stated that

Academy regulations forbade such examination, and denied this request.

21. Dr. Treister asked Dr. Kolb to further specify the nature of the charges so that he could rebut them. Dr. Kolb stated that Academy regulations forbade such disclosure, and denied this request.

22. Dr. Treister asked Dr. Kolb the identity of the persons making the charges, so that he could confront his accusers. Dr. Kolb stated that Academy regulations forbade such disclosure, and denied this request.

23. Dr. Treister asked Dr. Kolb to cite the regulations referred to in Paragraphs 20, 21 and 22 above. Dr. Kolb denied this request, refused to cite any authority for denying Plaintiff's requests to see his file, to be informed of the charges against him or to identify his accusers, as stated in Paragraphs 20, 21

and 22 above, and refused to cite any authority for refusing to cite such authorities, as stated in this Paragraph.

24. At the suggestion of Dr. Kolb, Plaintiff wrote a letter, dated February 6, 1976, and addressed to Dr. Kolb as agent for the Academy, attempting to rebut the charges as well as possible under the circumstances.

25. The letter referred to in Paragraph 24 concluded with a request for all available appeal rights, and for the right to be represented by counsel, in these words:

> I urge the Committee to probe these matters in depth and I shall welcome the opportunity and seek the right to participate in any such investigations. I shall also be more than happy to employ my counsel at my expense to aid the committee in this process on an administrative level.

26. — Dr. Treister received no response to this letter. He received no communication from the Academy or any representative thereof concerning this application until October 1976, when he received a letter stating that his application had been rejected, that the matter was closed, and that he could not apply for admission again for three years. A copy of this letter is attached to this Complaint as Exhibit B and incorporated herein by reference.

27. At present and at all times since said rejection, Defendant Academy has continued to refuse disclosure of the contents of the aforesaid file or to afford Dr. Treister any opportunity to rebut the charges therein.

28. After being required to wait for three years in accordance with the Academy's

By-Laws, Dr. Treister has recently re-applied for membership. This separate, second application of his is now under the Academy's consideration.

DR. MARRESE'S APPLICATION

29. On or about May 1975 Plaintiff Dr. Marrese made a similar application to that of Dr. Treister described hereinabove in Paragraph 14. On information and belief, after said application, the Academy prepared a list of applicants including Dr. Marrese similar to the list described hereinabove in Paragraph 15 and distributed it in a similar manner accompanied by a similar request for information. Early in 1976, Dr. Marrese, pursuant to this other application for membership, was interviewed by another member of a different Regional Admissions Committee.

30. Thereupon, sometime after March 31, 1976, and prior to October 12, 1976, based

upon in whole or in part, Dr. Marrese's 1975 application, the aforesaid interview, and the responses to the aforesaid public solicitation of comments, the Admissions Committee of Defendant reviewed the application, the interview and the comments contained therein and made a recommendation to the Board of Directors as to the disposition of the application.

31. On or about October 12, 1976, Dr. Marrese was notified that the Board of Directors of Defendant had deferred his application for membership for one year.

32. Dr. Marrese thereupon requested that the Defendant grant to him a review or appeal procedure so that the contents of his admissions file might be disclosed to him and that he might thus be afforded the opportunity to rebut any adverse or incorrect information therein contained relevant to his qualifications for admission.

33. On December 17, 1976, the Defendant denied to the Plaintiff his request for a review or appeal from its deferment decision of October 1976, by reason of Exhibit C, attached hereto and incorporated herein by reference.

34. On information and belief, in January of 1977, the Defendant sent to its Fellows another letter similar to the one sent in 1975, soliciting comments and information regarding Dr. Marrese with respect to his deferred candidacy for admission to Defendant organization; and Dr. Marrese verily believes that the Academy received responses thereto which are being held in his admissions file.

35. In 1977, Dr. Marrese was again interviewed, with respect to his renewed candidacy for admission to Defendant organization, by a member of Defendant's Regional Admissions Committee. On information and

belief, the interviewer's comments were placed in his admissions file and were relied upon in consideration of his renewed membership application.

36. Defendant thereupon, after receipt of the report of said interview and responses to the aforesaid public questionnaire, reviewed the application and made a new recommendation to the Board of Directors.

37. On several occasions during 1977, Dr. Marrese specifically requested the opportunity to review his file and to meet, at an appropriate hearing, with counsel, any false, misleading or adverse allegations or information against him which might affect or have affected the action of the Regional Admissions Committee or the ultimate action of the Board of Directors of Defendant.

38. However, Dr. Marrese was at no time informed of any responses to the questionnaire, or of the existence or substance of

any other information or contents in his admissions file. He neither had nor has any knowledge whether any information contained in his file was or is false, misleading, adverse or favorable.

39. In October of 1977, Dr. Marrese was informed that the Defendant had rejected his application for Admission as per Exhibit D and that he was ineligible to reapply for admission for three years.

40. Thereafter, on December 2, 1977, he once again requested that any adverse information contained in his admission file, relied upon by Defendant in rejecting his candidacy, be disclosed to him, in summary form at least, and that he be granted the opportunity to rebut the same in writing or in person, and that his application be thereafter reconsidered, or in the alternative, the three-year requirement for reapplication be waived.

41. However, at present and at all times since the aforesaid rejection, Defendant Academy has continued to refuse disclosure of the contents of Dr. Marrese's file or to afford him any opportunity to rebut the charges contained therein or to reconsider his application, and has further refused to waive its three-year reapplication rule.

NATURE AND RESULT OF EXCLUSIONS

42. Three principal reasons for Dr. Treister's exclusion from the Academy were (a) his supposed willingness to offer expert testimony against other orthopaedic surgeons in medical malpractice cases; (b) his known willingness to consult surgical out-patients on a relatively high-volume basis; and (c) his nonconformity of personality and personal atitutes with those of most established orthopaedic surgeons and in particular those who were already members

of the academy. All three of these reasons were either stated or implied by Dr. Kolb in the course of the interview described in Paragraphs 17-23 hereinabove.

43. On information and belief, neither Dr. Treister's nor Dr. Marrese's professional expertise, medical ethics or devotion to his patients' welfare was ever questioned during the application process.

44. Both Dr. Treister and Dr. Marrese's continued exclusion has been arbitrary, in violation of fundamental due process and competitive fairness and for reasons totally extraneous to the occupational qualifications for admission set forth in the Academy's By-Laws (a copy of which is attached hereto and incorporated herein by reference as Exhibit E). Those qualifications are as follows:

(a) Certification by the American Board of Orthopaedic Surgery;

(b) Medical practice devoted exclusively to orthopaedic surgery and for at least three years subsequent to the completion of the period of formal training;

(c) Citizenship or practice in the United States or Canada; and

(d) Good moral character and adherence to the Principles of Medical Ethics of the American Medical Association.

45. Both Plaintiffs complied with all the occupational qualifications listed above. They also complied with all relevant procedural requirements for completion of their applications, including their sponsorship by the requisite number of Fellows of the Academy.

46. Yet, because of extraneous additional factors that the Academy could not legally include in its official criteria

(including but not limited to, in Dr. Treister's case, the three factors mentioned hereinabove in Paragraph 42), both applications were denied.

47. Said extraneous additional factors were jointly considered and jointly applied by conspiring members of the Academy, first in determining the Admissions Committee's respective recommendations to the Board of Directors and then in making the Board of Directors' respective negative decisions.

48. The By-Laws and other rules and regulations of the Academy contemplated, invited and encouraged the application of the aforesaid extraneous additional factors by: (a) forbidding the disclosure of any information in any applicant's file except to the Admissions Committee and the Board of Directors; (b) forbidding any applicant to "question" in any manner any adverse decision; (c) failing to limit the

grounds of any recommendation or rejection decision to the specific occupational criteria mentioned hereinabove in Paragraph 44; (d) requiring a two-thirds approving vote by the Board of Directors for the acceptance of any application; (e) filing to require that any disapproving vote must constitute a finding by said Board of Directors of the noncompliance of the applicant with the specific occupational criteria mentioned hereinabove in Paragraph 44; (f) making every Academy member's continued nondisclosure of the contents of any application file or of the reason for any application decision, after such decision, a requirement of continued eligibility for membership in the Academy.

49. The exclusion of Doctors Treister and Marrese in the aforesaid circumstances served no proper competitive purpose but, on the contrary, had the purpose and effect

of coercing them and other orthopaedic surgeons who hoped to become members of the Academy to avoid any public criticism of their colleagues (particularly, those who were already members) or any significant display of nonconformity with the latter's currently favored social or business practices. Whatever valid ethical or professional purposes might have been served by exclusion on the basis of specific controvertible charges based on specific job-related criteria were not served by exclusion based on unknown charges and a one-third veto vote of competitors.

50. The exclusion of Plaintiffs was part of a continuing contract, combination or conspiracy by all the members of the Academy, acting through the Academy, to limit competition and enforce conformity with current business practices, both by excluding nonconforming practitioners and

by implicitly threatening all applicants who might otherwise tend not to conform. The "additional" admissions criteria to be considered by the Admissions Committee(s) and Board of Directors have been left vague, arbitrary and unchallengeable because the members of the Academy have collectively desired such arbitrary control over entrants.

51. The continuing limitation of competition is a necessary and inevitable result of the arbitrary discretion given to the Admissions Committee(s) and the Board of Directors by the Academy's By-Laws and other rules and regulations, and the absence of procedural protections for applicants.

52. There are many other examples of this anticompetitive effect throughout the country, including the case of Dr. Frederic Huffnagle in Danvers, Massachusetts, who has informed Plaintiffs' attorneys of his belief that he has been excluded from member-

ship in the Academy because of his willingness to perform back operations upon patients referred to him by chiropractors.

53. The refusal of Defendant to allow either Plaintiff to have access to the information contained in his file constituted a related combination or conspiracy on the part of all the responsible individual members of the Academy to conceal the anticompetitive nature of the secret charges made against Plaintiffs and the anticompetitive intent of the Directors in making their ultimate exclusionary decisions. On information and belief, this related conspiracy continues to this day with the design of destroying the file records as soon as they are removed from court protection.

54. This related conspiracy is purportedly justified by provisions of the Academy's By-Laws prohibiting rejected

applicants to question the rejection decision or to learn or disclose any information in their files, and is further purportedly justified by a lately instituted, so-called Automatic Document Destruction policy of Defendant.

55. Plaintiffs' aforesaid exclusion from membership in the Academy has been implemented by, among other things, the omission of their names from nationally circulated membership rosters.

56. The aforesaid contracts, combinations and conspiracies have substantially and directly injured and affected trade and commerce among the several states in the provision of orthopaedic surgical services. They have deliberately lowered the standard and restricted the variety and quantity of orthopaedic surgical care provided to patients throughout the country, including those who are insured under the

Medicare and Medicaid programs.

57. By reason of said boycotts in violation of Section 1 of the Sherman Act, Plaintiffs have been and will continue to be injured in their business and property, including the loss of profit and good will up to the date of filing of this Complaint. Plaintiffs will lose referrals, will be obliged to pay higher insurance rates, will be denied access on equal terms to the latest professional knowledge and opinion, will become less desirable as expert witnesses, consultants or group practice partners, and may lose hospital privileges at various institutions.

58. Dr. Treister has on various occasions been obliged to disclose his rejection for Academy membership in all the professionally important contexts mentioned hereinabove in Paragraph 12, and to attempt to explain the Academy's rejection

decision. He was recently interrogated on this point in connection with his pending application to the American College of Surgeons.

59. Both Plaintiffs have also been asked many times by their professional colleagues why they have not yet been admitted to the Academy, and both Plaintiffs have been informed of widespread suspicions about the reasons for their rejection.

60. Dr. Marrese knows of at least one highly qualified surgeon, formerly at the DuPont Institute in Delaware, who declined to join him in practice because of his nonmembership in the Academy.

61. Dr. Treister knows of at least two similar instances where surgeons declined to join his practice on the basis of warnings from the chief of their residency program that he (Dr. Treister) was having "trouble" with the Academy and that there

was "something wrong."

62. Both Plaintiffs have been forced to wear special, humiliating, nonmember badges at Academy meetings and functions that they have attended, and have been charged more but ranked last in priority for continuing education programs.

63. Further, when the adverse decision of the Illinois Appellate Court was issued in Dr. Treister's previous state-law action for relief against the Academy, the Forkosh Memorial Hospital in Chicago, Illinois, denied his application for permanent staff privileges. Those privileges were only later obtained as the result of separate legal action.

64. The total amount of the above damages, both present and future, can best be approximated (prior to discovery) at THREE MILLION DOLLARS ($3,000,000) in each Plaintiff's case. Plaintiffs are, there-

fore, each entitled to recover NINE MILLION DOLLARS ($9,000,000) from Defendant, plus costs and attorney's fees, pursuant to Section 4 of the Clayton Act, 15 U.S.C. Section 15.

COUNT II

1-65.* For Paragraphs 1-65* of Count II, Plaintiffs reallege the allegations of Paragraphs 1-63 of Count I of this Amended Complaint.

66. The foregoing allegations clearly establish a prima facie case of the per se illegality of the above exclusions as a boycott prohibited by, e.g., McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008 (S.D. Ill., S.D. 1974), aff'd by unpublished order 606 F. 2d 1404 (7th Cir. 1974), and Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.ed.2d 389, rehearing denied 375 U.S. 870 (1963).

*[Paragraph numbers are corrected in accordance with Corrected Amended Complaint.]

There is a substantial likelihood that Plaintiffs will prevail on the merits.

67. Both Plaintiffs will suffer irreparable harm to their business if the unlawful conduct of the Defendant is not enjoined, since their loss of future income resulting from the boycott will not be exactly calculable and is difficult even to approximate. Damages cannot fairly compensate the Plaintiffs for the loss of honor and professional reputation suffered by reason of Defendant's boycott. Because the Academy is unique in its field, the benefits of membership therein are irreplacable.

68. The injury to Plaintiffs is great and the granting of equitable relief will do little harm to Defendant. Plaintiffs' inclusion as members of the Academy could not appreciably injure the Academy or impair its functions, whereas their continu-

ing exclusion inflicts continuing short and long-term injuries upon Plaintiffs' careers. No public interest is served by continuing to allow total arbitrariness in the Academy's admissions procedures, whatever the specific intention behind their application in the Plaintiffs' case.

69. Defendant's attorneys have made various references to Defendant's so-called Automatic Document Destruction policy. On information and belief, any such policy was instituted subsequent to the commencement of legal action against Defendant by Dr. Treister and was and is designed to thwart the Plaintiffs' proof of the charges of anticompetitive motivation and coercion made herein. The above documentary "policy" and Defendant's proclaimed reliance upon By-Laws of the Academy that prohibit any disclosure of the contents of application files (even to a court) create

an imminent risk of the destruction of both Plaintiffs' files unless a temporary restraining order and injunction are issued.

PRAYER FOR JUDGMENT

WHEREFORE, Plaintiffs pray for judgment against Defendant Academy for injury to their business and property as follows:

1. That this Court adjudge and decree that the contracts, combinations and conspiracies and acts pursuant thereto herein complained of were and are void and illegal as restraints of trade in violation of Section 1 of the Sherman Act.

2. That each Plaintiff therefore have judgment against Defendant in the amount of NINE MILLION DOLLARS ($9,000,000) plus costs and reasonable attorney's fees.

3. That Defendant be temporarily and perpetually enjoined and restrained from further violations of the Sherman Act as alleged in this Complaint, including but

not limited to any tampering or interference with the aforesaid file records, any continued enforcement or attempted enforcement of the Academy's By-Laws or other rules or regulations against Plaintiffs in such a manner as to affect adversely Plaintiffs' membership eligibility because of their legal and other actions to obtain membership in the Academy.

4. That this Court declare and decree null and void any By-Law or rule or regulation of the Academy that: (a) permits the Academy to deny membership to any orthopaedic surgeon who has been certified by the American Board of Orthopaedic Surgery and been engaged in the exclusive practice of orthopaedic surgery for at least three years following his period of formal training, except upon the basis of such other explicit, objective, reasonable occupational qualifications as are presently contained in the

By-Laws or which the Academy may hereafter establish; (b) forbids a rejected applicant to question such adverse decision or otherwise to receive the same procedural protections in regard to such decision as an existing member would have in regard to a disciplinary proceeding against him; or (c) forbids the disclosure of the contents of an application file to a rejected applicant, except insofar as the names of any informants may be deleted.

5. That Plaintiffs have such other further relief as the Court in the course of this action may deem just and proper.

Dated this seventeenth day of June, 1980.

Landesman & Schwartz & Auslander
Foss, Schuman & Drake

_____
William J. Stevens

_____
Michael T. Sawyier

Glenn A. Schwartz
Charlotte A. Ziporyn
Of Counsel
Landesman, Schwartz & Auslander
10 S. LaSalle Street
Chicago, IL 60603
(312)346-6650

Stephen B. Cohen
William J. Stevens
Joseph Schuman
Michael T. Sawyier
Of Counsel
Foss, Schuman & Drake
11 S. LaSalle STreet
Chicago, IL 60603
(312)782-2610

EXHIBIT A

APPLICATION FOR ACTIVE FELLOWSHIP

American Academy of Orthopaedic Surgeons

430 North Michigan Avenue

Chicago, Illinois 60611

[Type exactly as you desire your name to be carried in Academy records.]

NAME_____

[Last Name] [First Name] [Middle Name or Initial]

Date of Birth_____Birthplace_____

Citizenship_____

Medical College_____Degree_____

Date_____

City & State/Country_____

Duplicate: Applicant must return this copy directly to the American Academy of Orthopaedic Surgeons, 430 North Michigan Avenue, Chicago, Illinois 60611.

Specify addresses to which mail is to be directed. Office ( ) Home ( ) Notify Academy Office of address changes.

OFFICE ADDRESS:

Street & Number_____

City_____State or Provence_____

Zip Code Number_____

NAME & ADDRESSES OF SPONSORS:

1._____

Street & Number_____

City & State_____Zip Code_____

2._____

Street & Number_____

City & State_____Zip Code_____

Recommendations of Regional Admissions Committees and the Admissions Committee

Regional Admissions Committee #_____

Approve:_____Date_____

Defer:_____Date_____

Reject:_____Date_____

Admissions Committee _____

Approve: _____ Date _____

Defer: _____ Date _____

Reject: _____ Date _____

1. Date of Certification by the American Board of Orthopaedic Surgery _____

2. How long have you practiced orthopaedic surgery in your present location? _____

3. Do you limit your practice exclusively to Orthopaedic Surgery? _____

Since: [Month & Year] _____

4. Internship:	Month & Year	Month & Year
_____	_____	_____
_____	_____	_____

5. Residency:

[General, Surgical or Medical]

_____	_____	_____
_____	_____	_____

	Month & Year	Month & Year
_____	_____	_____
_____	_____	_____

6. Resident Training in Orthopaedic Surgery

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. Other Post-Graduate Study, including Fellowships

_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Hospital Affiliations:

_____

_____

_____

12. Military Service:

	From	To
General Medical____	____	____
_____	____	____
Orthopaedic_____	____	____
_____	____	____

Are you a career Officer? Yes_____No_____

Do you anticipate returning to civilian practice? Yes_____ No_____ Date_____

Address if known:

Street & Number_____

City & State_____Zip Code_____

13. Additional Data:

a] Medical Society Memberships: [List any office or committee appointment you hold or have held.]

_____

_____

_____

_____

_____

_____

_____

9. Teaching Affiliations:

_____

_____

_____

10. Licensed to practice in the following states: [give dates]

_____

_____

_____

_____

_____

11. Places of practice and years of location in each:

Address	From	To
_____	____	____
_____	____	____
_____	____	____
_____	____	____
_____	____	____

b] Academic degrees other than M.D. and Special Honors:

c] Contributions to Medical Literature: [Append sheet if additional space is required.]

d] Other Scientific Contributions:

14. Compliance with By-Laws and Agreement of Confidentiality regarding Application

The undersigned agrees that he will comply with each and every provision of the By-Laws of the American Academy of Orthopaedic Surgeons and any duly adopted rules and regulations pursuant thereto; and that he will comply with the Principles of Medical Ethics of the American Medical Association. It is further specifically agreed by the undersigned, that in consideration of the Academy's treatment of the entire contents of this application, as well as all inquiries or investigations made pursuant thereto as privileged

and confidential material, and not subject to publication or public dissemination whether voluntarily, involuntarily or by operation of law, that the undersigned specifically authorizes the Academy to make whatever inquiries and investigation it deems necessary to verify the credentials, professional standing and moral or ethical character of the undersigned. The undersigned further agrees that he will not cause or attempt to cause any public disclosure of the contents of any application of any applicant for Fellowship or Membership in the Academy, of whatever classification, or any proceedings of any Admissions Committee pursuant thereto, whether said public disclosure be by operation of law or otherwise.

To preserve the confidentiality of the admission proceedings, it is specifically agreed by and between the applicant and the Academy that the contents of an applicant's admission file, except the application form and a copy of any correspondence to the applicant indicating final action, will be destroyed by the Academy 12 months after the date of mailing such notification to the applicant of the final action taken.

Signature_____Date_____

Date application forwarded to applicant:_____

Exhibit B

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

430 North Michigan Avenue

Chicago, Illinois 60611

(312) 822-0970

October 29, 1976

Michael R. Treister, M.D.

120 N. Ashland Avenue

Chicago, IL 60622

Dear Doctor Treister:

Your application for Fellowship in the American Academy of Orthopaedic Surgeons has been rejected by action of the Board of Directors and the file has been closed.

Under the membership policies of the Academy, you may reapply for Fellowship

in three years by submitting an entirely new application.

Sincerely yours,

E. Burke Evans, M.D.

Secretary

EBE:pw

Exhibit C

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 822-0970

December 17, 1976

R. Anthony Marresi, M.D.
St. Mary's Medical Building
801 St. Mary's Drive
Evansville, Indiana 47715

Dear Doctor Marresi:

Your letter to Dr. R. Kirklin Ashley, former Chairman of the Admissions Committee has been referred to the Academy office for response.

The By-Laws of the Academy (excerpts of which you received along with your initial application) provide that: "The entire contents of any application for Fellowship or Membership in the Academy, of whatever classification, shall be privileged and confidential and shall not be subject to publication nor public dissemination whether voluntary, involuntary or by operation of law. Said application shall be forwarded only to the appropriate Admissions Committee for consideration. Any investigation, inquiries made by, or responses received by any Admissions Committee shall likewise be privileged and confidential and shall not be subject to publication or public dissemination whether voluntary, involuntary or by operation of law." The Academy By Laws further provide that:

"In the event of an adverse recommendation by the Admissions Committee or an adverse action by the Board of Directors no applicant shall be entitled to question the decision.

We also wish to call your attention to the application form which you submitted. By your signature thereon, you have agreed to respect and preserve the confidentiality of all proceedings or deliberations pertaining to the processing of your application.

In accordance with the above By Law provisions, your request for review or appeal of your application cannot be granted. As you know, your current status is one of "deferment" pending further consideration. This means that no decision as to

your eligibility has been made to date.

We thank you for your interest in the Academy.

Sincerely,

Charles V. Heck, M.D.

CVH:pw

Exhibit D

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

430 North Michigan Avenue

Chicago, Illinois 60611

(312) 822-0970

October 12, 1977

R. Anthony Marrese, M.D.

801 St. Mary's Drive

Evansville, Indiana 47715

Dear Doctor Marrese:

Your application for Fellowship in the American Academy of Orthopaedic Surgeons has been rejected by action of the Board of Directors and the file has been closed.

Under the membership policies of the Academy, you may reapply for Fellowship

in three years by submitting an entirely new application.

Sincerely,

E. Burke Evans, M.D.

Secretary

EBE:pw

Exhibit E

BY-LAWS

OF THE

AMERICAN ACADEMY

OF ORTHOPAEDIC SURGEONS

FEBRUARY, 1980

American Academy of Orthopaedic Surgeons

444 North Michigan Avenue

Chicago, Illinois 60611

(312) 822-0970

DO NOT DESTROY

Your

Copy

Of

THE BY-LAWS

OF THE

AMERICAN ACADEMY

OF ORTHOPAEDIC SURGEONS

BY-LAWS*

OF

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

AN ILLINOIS NOT-FOR-PROFIT CORPORATION

ARTICLE I

Name

The name of this Corporation shall be the AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS.

ARTICLE II

Objectives and Purpose

The objective of the ACADEMY shall be the advancement of orthopaedic surgery. Orthopaedic surgery is the medical specialty that includes the investigation, preservation, restoration and development of the form and function of the extremities, spine and associated structures by medical, surgical and physical methods.

*Revised January 1972, Amendments through February 1980 included.

The purposes of this Corporation are exclusively to foster, promote, support, augment, develop and encourage investigative knowledge of orthopaedic surgery and the prevention of disorders of the musculoskeletal system; to encourage the teaching and education of said medical specialty by developing, publishing and copyrighting educational materials and to promote specialized training for medical personnel in orthopaedic surgery; to foster, promote, support, augment, develop and encourage education of non-medical personnel engaged in scientific endeavors relating to the field of orthopaedic surgery.

Further purposes are exclusively to foster, promote, support, develop and encourage charitable, scientific or educational purposes provided, however, no

part of the net earnings of the Corporation shall insure to the benefit of any private shareholder or individual; no substantial part of the activities of the Corporation shall be utilized in the carrying on of propaganda or otherwise attempting to influence legislation and the Corporation shall not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

ARTICLE III

Offices

The Corporation shall have and continuously maintain in this state a registered office and a registered agent whose office is identical with such registered office and may have other offices within or without the State of Illinois as the Board of

Directors may from time to time determine.

ARTICLE IV

Status and Categories of Membership

Section 1. Status

Membership in the ACADEMY is a privilege, not a right, and is dependent upon the applicant adequately demonstrating compliance with the requirements for membership as contained in the Articles of Incorporation, the By-Laws, the Rules and Regulations and the Policy Statements as adopted by the Fellowship or the Board of Directors. No person shall be elected or remain a member of the ACADEMY without adequately demonstrating that such individual is of good reputation and standing within his community, and is of high ethical character and professional repute.

Section 2. Categories

There shall be two categories of membership in the AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, namely, Fellows and Members.

ARTICLE V

Fellowship

Section 1. Classes of Fellows

There shall be three (3) classes of Fellows of the AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, namely, Active Fellows, Inactive Fellows and Emeritus Fellows. Only Fellows shall have the right to vote and hold office in the ACADEMY.

Section 2. Active Fellowship

Active Fellowship shall be limited to those individuals who, at the time of admission, are certified by the American Board of Orthopaedic Surgery and whose medical practice is devoted exclusively

to orthopaedic surgery or who are actively engaged in the teaching or research of orthopaedic surgery or related subject matter. Active Fellows must either be citizens of or in practice in the United States or Canada. Any Active Fellow who changes from the active practice of orthopaedic surgery to the administrative practice of medicine, under public or private auspices, shall be eligible to remain an Active Fellow. The Board of Directors may from time to time, confer a reduced dues status upon an Active Fellow who is not currently engaged in the active practice of medicine upon application to the Board of Directors from said member.

Section 3. Qualifications and Election Procedure for Active Fellowship

Each applicant for Active Fellowship in the ACADEMY must be certified by the

American Board of Orthopaedic Surgery and must have engaged in the exclusive practice of orthopaedic surgery for a minimum period of three (3) years subsequent to the completion of his period of training.

Each applicant must submit an application to the Secretary of the ACADEMY on forms provided by the ACADEMY and the application must be endorsed by two (2) Active Fellows, or by one (1) Active Fellow and one (1) Emeritus Fellow. The Secretary shall then forward the completed application to the Admissions Committee which shall be responsible for the selection of those applicants who are to be recommended for election as Fellows of the ACADEMY.

The Admissions Committee, upon receipt of the application, shall forward the application to the appropriate Regional

Admissions Committee for investigation. The entire contents of the application, along with all proceedings before or inquiries made by any Admissions Committee, shall be privileged and confidential.

The appropriate Regional Admissions Committee shall conduct a personal interview with the applicant and shall make all necessary investigation to verify the credentials of the applicant and determine his qualifications. It shall submit its recommendations to the Admissions Committee. The Admissions Committee shall review the list of the applicants and submit its recommendations to the Board of Directors. Election to Active Fellowship shall be by two-thirds vote of the Board of Directors. In the event of an adverse recommendation by the Admissions Committee or an adverse action by the Board of Direc-

tors, no applicant shall be entitled to question the decision.

Section 4. Standards for Continued Active Fellowship

As a condition of continued Active Fellowship in the ACADEMY, a Fellow shall demonstrate:

(1) Compliance with the standards for continued education as established from time to time by the Board of Directors;

(2) Continued compliance with the requirements for Active Fellowship, as contained in Section 2 of this Article;

(3) Continued compliance with the Articles of Incorporation, By-Laws, Rules and Regulations and Policy Statements as adopted by the Fellowship or the Board of Directors;

(4) Maintenance of a full and unrestricted license to practice medicine in the United States or Canada or evidence of full time medical service in the Federal Government which does not require licensure, maintenance of good reputation and standing within his community and high ethical character and professional repute;

(5) Compliance with the dues and fees requirements established from time to time by the Board of Directors;

(6) Continued compliance with Section 3 of Article VIII of these By-Laws.

Section 5. Inactive Fellowship

An Active Fellow who has become disabled by sickness or accident or otherwise

becomes incapacitated for a period in excess of six (6) months and who is unable to engage in the practice of medicine or to assume duties of a medically oriented nature under public or private auspices, may request a transfer from the status of Active Fellowship to that of Inactive Fellowship, with waiver of dues. The request for transfer and waiver of dues must be made in writing to the Secretary of the ACADEMY. The status of those in this category of Fellowship may be reviewed annually by the Admissions Committee and the Board of Directors unless terminated by the Inactive Fellow upon written notice to the Secretary of the ACADEMY.

Section 6. Emeritus Fellowship

A Fellow who has reached the age of sixty-five (65) shall automatically be transferred to Emeritus Fellowship with

waiver of dues unless said Fellow shall request that he be continued as an Active Fellow and pay annual dues. An Active Fellow who has been in good standing in the ACADEMY for a period of twenty-five (25) years or more and is retired from active practice of medicine may, upon written notice to the Secretary of the ACADEMY, request a transfer to Emeritus Fellowship status.

Section 7. Transfer Procedure

Requests for change in classification of Fellowship, not otherwise defined by these By-Laws as automatic, shall be forwarded by the Secretary of the ACADEMY to the Admissions Committee for its review and recommendations. The Admissions Committee shall review the requests for transfer and forward them along with its recommendations to the Board of Directors.

Any change in classification of Fellowship shall require two-thirds vote of the Board of Directors.

ARTICLE VI

Membership

Membership in the ACADEMY shall consist of five (5) classifications, namely: (1) Associate Membership, (2) Associate Membership -- Allied Specialties, (3) Associate Membership -- Basic Sciences, (4) Honorary Membership, and (5) Corresponding Membership. A member may attend and participate in all scientific meetings but may not hold office or attend any regular or special ACADEMY business meeting.

Section 1. Associate Membership

Associate Membership shall be limited to certain physicians who were elected to this classification of membership at

the founding of the ACADEMY. This category of membership is closed. There shall be no further additions to this classification of membership.

Section 2. Associate Membership -- Allied Specialties

Associate Membership -- Allied Specialties may be conferred by the ACADEMY on distinguished members of the medical profession, not orthopaedic surgeons whose activities, interests and contributions are related to orthopaedic surgery.

An individual may be proposed by five Active or Emeritus Fellows at least two of whom reside in the same region as the candidate. A letter of recommendation from each sponsor and a copy of the candidate's curriculum vitae must be submitted to the Secretary of the ACADEMY, who will forward them to the Admissions

Committee.

Upon the approval of the individual by the Admissions Committee, he shall be invited by the Secretary of the ACADEMY to submit an application for Associate Membership -- Allied Specialties on a form provided by the ACADEMY. The Admissions Committee shall then forward the completed applications of the candidates to the appropriate Regional Admissions Committee for investigation and review. The appropriate Regional Admissions Committee shall consider the evidence presented by the sponsors of the candidate testifying to the candidate's credentials, eminence, including his curriculum vitae and his general contributions to the advancement, teaching or practice of orthopaedic surgery. This committee shall have the right to request a personal interview with the candidate. The

committee shall submit its recommendation to the Admissions Committee. The Admissions Committee shall review the list of applicants, then submit its recommendations to the Board of Directors. Election to membership in the ACADEMY in this classification shall be by two-thirds vote of the Board of Directors.

Section 3. Associate Membership -- Basic Sciences

Associate Membership -- Basic Sciences may be conferred by the ACADEMY on individuals distinguished in a basic science related to orthopaedic surgery. Application and election to membership as an Associate Member -- Basic Sciences will be in the same form and follow the same procedure as described in Article VI. Section 2 above, referring to Associate Membership -- Allied Specialties.

Section 4. Honary Membership

Honorary Membership may be conferred upon an individual by the Board of Directors. Each Honorary Member who is duly elected shall be issued a certificate signifying admission as an Honorary Member.

Section 5. Corresponding Membership

Corresponding Membership may be conferred by the ACADEMY upon a physician who has been certified by the American Board of Orthopaedic Surgery and who has been engaged for at least three (3) years in the exclusive practice of orthopaedic surgery subsequent to the completion of his period of training if the physician is not practicing orthopaedic surgery in the United States or Canada and is not a citizen of or residing within the United States or Canada. This membership is to be automatically forfeited if a Corresponding Member

subsequently establishes residence, citizenship or a medical practice in either the United States or Canada. In that event, the Corresponding Member must surrender his certificate to the Board of Directors upon request.

An individual may be proposed by five Active or Emeritus Fellows. A letter of recommendation from each sponsor and a copy of the candidate's curriculum vitae must be submitted to the Secretary of the ACADEMY, who will forward them to the Admissions Committee. Upon the approval of the individual by the Admissions Committee, he shall be invited by the Secretary of the ACADEMY to submit an application for Corresponding Membership on a form provided by the ACADEMY. The Admissions Committee shall consider the evidence presented by the sponsors of the candidate testifying to

the candidate's credentials, eminence, including his curriculum vitae and his general contributions to the advancement, teaching or practice of orthopaedic surgery. This committee shall have the right to request a personal interview with the candidate. The Admissions Committee shall submit its recommendations to the Board of Directors. Election to membership in the ACADEMY in this classification shall be by two-thirds vote of the Board of Directors.

Section 6. Reciprocal Membership

This is a closed category of membership. No new members may be admitted into this category after the effective date of this By-Law amendment. Any existing Reciprocal Member whose membership terminated due to non-payment of dues or otherwise may not be reinstated to this category of membership.

ARTICLE VII

Ethics and Discipline

Section 1. Forms of Disciplinary Action

All disciplinary action of a Fellow or Member of the Academy shall be taken by the Board of Directors which may censure, reprimand, suspend, expel, or otherwise discipline such Fellow or member.

Section 2. Grounds for Disciplinary Action

A Fellow or Member of the ACADEMY may be disciplined for any of the following reasons:

(1) Failure to comply with the requirements contained in the Articles of Incorporation, or By-Laws of the Corporation, the Rules and Regulations and Policy Statements of the ACADEMY as adopted by the Fellowship or the Board of Directors;

(2) Failure to continually comply with the requirements for Fellowship or Membership of the particular classification of membership which the individual possesses, except as permitted by these By-Laws;

(3) Being in arrears in dues for more than two years.

In addition, an Active Fellow may be disciplined by the Board of Directors for violation of the requirements for continued Active Fellowship as are contained in Section 4 of Article V of these By-Laws.

Section 3. Complaints and Procedures

All complaints or requests for disciplinary action of a Fellow or Member of the ACADEMY shall be made in writing and addressed to the President of the ACADEMY. After due deliberation, the President may

refer the complaints and charges (other than a complaint involving being in arrears in dues or the involuntary termination, suspension or forced resignation of an unlimited medical license) to the Admissions Committee which shall consider them. The Admissions Committee may refer such complaints and charges to the appropriate Regional Admissions Committee for investigation. After investigation, the Regional Admissions Committee shall formulate written recommendations for the advice of the Admissions Committee. The Admissions Committee shall submit its recommendations in writing to the Board of Directors, along with reports and other documentary evidence used in its deliberations.

Prior to formulating its recommendations, the Administration Committee shall meet to consider the matter and the Fellow or

Member in question shall be notified at least thirty (30) days in advance by registered or certified mail of the date, place and time of that meeting. The notification shall include the nature of the complaint, charges and request for disciplinary action. The individual and/or personal representative and/or counsel shall also be invited to appear before the Admissions Committee to submit such relevant evidence or rebuttal as the individual may deem proper.

If the complaint is based upon non-payment of dues, the Treasurer of the ACADEMY shall so certify to the Board of Directors.

If the complaint is based upon involuntary termination, suspension or forced resignation of license to practice medicine, the Secretary of the ACADEMY shall document the fact for the Board of Directors.

Written notice shall be sent to the affected Fellow or Member by registered or certified mail not less than thirty (30) days prior to the scheduled date of the meeting of the Board of Directors at which the matter is to be considered informing the individual that he may appear in person, and/or by his personal representative and/or counsel before the Board of Directors. A copy of the recommendations of the Admission Committee shall be included.

Disciplinary action of a Fellow or Member of the ACADEMY shall require the affirmative vote of not less than three-fourths of the members of the Board of Directors present at the meeting at which such action is taken. The Secretary shall, within thirty (30) days thereafter, cause notice of action by the Board of

Directors to be sent to the individual by registered or certified mail. If disciplinary action is taken, he shall state the general basis of the disciplinary action.

Section 4. Status During Proceedings

The status of such Fellow or Member shall be unaltered during the pendency of these proceedings.

ARTICLE VIII

Confidentiality

Section 1. Confidentiality of Application

The entire contents of any application for Fellowship or Membership in the ACADEMY, of whatever classification, shall be privileged and confidential and shall not be subject to publication nor public dissemination whether voluntary, involuntary or by operation of law. Said application shall be forwarded only to the appropriate

Admissions Committee for consideration. Any investigation, inquiries made by, or responses received by an Admissions Committee along with all proceedings and testimony received by any Admissions Committee shall likewise be privileged and confidential and shall not be subject to publication or public dissemination whether voluntary, involuntary or by operation of law.

Section 2. Agreement of Confidentiality

Every application for Fellowship or Membership in the ACADEMY of whatever classification, shall be deemed to contain an agreement by and between the applicant and the ACADEMY and separately signed by the applicant, the agreement to contain substantially the following language:

> "It is specifically agreed by the undersigned, that in consideration of the ACADEMY'S treatment of the entire con-

tents of this application, as well as all inquiries or investigations made pursuant thereto as privileged and confidential material, and not subject to publication or public dissemination whether voluntarily, involuntarily or by operation of law, that the undersigned specifically authorizes the ACADEMY to make whatever inquiries and investigation it deems necessary to verify the credentials, professional standing and moral or ethical character of the undersigned. The undersigned further agrees that he will not cause or attempt to cause any public disclosure of the contents of any application of any applicant for Fellowship or Membership in the ACADEMY, of whatever classification, or any proceedings of any Admissions Committee pursuant thereto, whether said public disclosure be by operation of law or otherwise."

Section 3. Requirement of Confidentiality

Any Fellow or Member of the ACADEMY, of whatever classification, as a condition precedent to his continued status as a Fellow or Member of the ACADEMY, shall be bound by the contents of the agreement as stated in Section 2 above, and shall not cause or attempt to cause any public disclosure of any privileged or confidential

material known to the ACADEMY whether by operation of law or otherwise.

Section 4. Confidentiality of Disciplinary Proceedings

All disciplinary proceedings pursuant to Article VII whether said proceedings result in disciplinary action or not, shall be privileged and confidential and shall not be subject to publication or, public dissemination whether by operation of law or otherwise; provided, however, announcements of the results of the disciplinary action may be published to members, Fellows or other interested third parties.

ARTICLE IX

Board of Directors

Section 1. General Powers

The affairs of the Corporation shall be managed by the Board of Directors.

Section 2. Number, Tenure and Qualification

The Board of Directors shall be composed of the following: President, First Vice-President, Second Vice-President, Secretary, Treasurer, Librarian-Historian, and the three (3) most recent past Presidents of the ACADEMY each of whom shall serve on the Board of Directors for a period of three (3) years after completion of tenure in office as President. The Chairman, Chairman-Elect, and Secretary of the Board of Councilors shall each serve as members of the Board of Directors. Two (2) directors, designated At-Large Members, who are less than forty-five (45) years of age at the time of election, shall be elected annually by the membership at the annual meeting of the ACADEMY and shall serve for a term of one (1) year. In the years in which the offices of Secretary-Elect and

Treasurer-Elect are filled, each shall sit on the Board of Directors ex-officio without vote. Representatives of affiliated organizations, as herein after provided (Article XXV) may sit on the Board of Directors, ex-officio, without vote. The Executive Director shall be an ex-officio member of the Board of Directors without vote.

Ex-officio members of the Board shall not attend executive sessions of the Board of Directors except by specific invitation.

No individual shall serve on the Board of Directors for longer than six (6) consecutive years, or for more than eleven (11) total years, except in the event that an officer is elected from the Board of Directors. The term of office of an At-Large-Member of the Board of Directors shall not be included in the above calculations.

Section 3. Regular Meetings

The regular meetings of the Board of Directors shall be held prior to the annual meeting of the ACADEMY and at such other time as the Chairman may designate for the transaction of such business that may come before the meeting. The Board of Directors may provide by resolution the time and place, either within or without the State of Illinois to hold additional regular meetings of the Board without other notice than such resolution.

Section 4. Special Meetings

Special meetings of the Board of Directors may be called by or at the request of the Chairman of the Board of Directors or by a majority of the directors. The person or persons authorized to call special meetings of the Board may fix any time and place, either within or

without the State of Illinois to hold any special meeting of the Board called by them.

Section 5. Notice

Notice of any special meeting of the Board of Directors shall be given at least seven (7) days previous thereto by written notice delivered personally or sent by mail or telegram to each director at his address as shown on the records of the Corporation. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail in a sealed envelope so addressed with postage thereon prepaid. If notice be given by telegram, such notice shall be deemed to be delivered when the telegram is delivered to the telegraph company. Any director may waive notice of any meeting. The attendance of a director at any meeting shall constitute

a waiver of notice of such meeting, except where a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the Board need be specified in the notice or waiver of notice of such meeting, unless specifically required by law or by these By-Laws.

Section 6. Quorum

A majority of the Board of Directors shall constitute a quorum for the transaction of business at any meeting of the Board, provided that if less than a majority of the directors are present those directors present may adjourn the meeting from time to time without further notice.

Section 7. Duties of the Board of Directors

The Board of Directors shall be the administrative authority of the ACADEMY and shall consider all of its activities and determine its policies. It may invite any member of another committee or any Fellow or Member to participate in its deliberations at any meeting. It shall receive and consider the reports of activities of committees and shall direct the Secretary to prepare an annual report to be submitted to the membership of the ACADEMY reviewing the work of the previous year. The Board of Directors, by two-thirds vote, shall be empowered to elect, reject, or defer an application for Fellowship or Membership in the ACADEMY.

The Board of Directors shall be authorized to employ an administrative agent of the ACADEMY who shall be desig-

nated Executive Director. The Executive Director shall possess the authority and be subject to the limitations as from time to time shall be imposed upon him by the Board of Directors. He shall be authorized to interpret pre-existing policy of the ACADEMY and shall act as an advisor to the Board of Directors. (See Appendix I)

Section 8. Officers of the Board of Directors

The Chairman of the Board of Directors shall be the President of the ACADEMY. The Vice-Chairman of the Board of Directors shall be the First Vice-President of the ACADEMY. The Secretary of the ACADEMY shall serve as the Secretary of the Board of Directors.

Section 9. Planning and Development Committee

There shall be a Planning and Development Committee of the Board of Directors, the membership of which shall be comprised of the three (3) most recent past Presidents of the ACADEMY. The past President with the longest tenure on this committee shall serve as Chairman. In the event of the death, resignation or inability to act of a member of the Planning and Development Committee, the Board of Directors shall be empowered to fill the vacancy. In the event of the death, resignation or inability to act of the Chairman, the Board of Directors shall appoint the Chairman for the unexpired term. This committee shall be responsible for both long and short range planning for the ACADEMY, as well as recommending innovation and changes in ACADEMY policy. It shall report directly to the Board of Directors and shall be

consultive and advisory to the Board of Directors at its request.

Section 10. Finance Committee

The Finance Committee shall consist of the two (2) most recent past Presidents and the Treasurer of the ACADEMY. The past President with the longer tenure on this committee shall serve as Chairman. The Finance Committee shall be in charge of all investment policies of the ACADEMY and shall manage, supervise and control all financial affairs of the ACADEMY and determine its financial policies, subject to the approval of the Board of Directors. The Finance Committee shall receive a monthly report. This committee shall meet at least annually and at the call of the Chairman to review the financial affairs of the ACADEMY and to report to the Board of Directors. In the event of the death,

resignation or inability to act of the Chairman or a member of the Finance Committee, the Board of Directors shall be empowered to fill the vacancy and appoint the Chairman for the unexpired term.

Section 11. Telephone Meetings

Unless specifically prohibited by the Articles of Incorporation or by the By-Laws, any action required to be taken at a meeting of the Board of Directors may be taken at a telephonic meeting, or meeting at which communication is permitted by other electronic voice transmissions and the action taken by such telephonic meeting at which a quorum is present shall be deemed to be the action of the Board of Directors.

Section 12. Informal Action by Directors

Unless specifically prohibited by the

Articles of Incorporation or by the By-Laws, any action required to be taken at a meeting of the Board of Directors, or any other action which may be taken at a meeting of the Board of Directors, may be taken without a meeting if a consent in writing setting forth the action to be taken, shall be signed by all directors entitled to vote with respect to the subject matter thereof. Any such consent signed by all directors shall have the same effect as a unanimous vote and may be stated as such and the document filed with the Secretary of State of the State of Illinois

Section 13. Manner of Acting

The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors, except where otherwise provided

by law or by these By-Laws.

Section 14. Indemnification

The Corporation shall hold harmless, indemnify, and defend, any and all of its directors or officers, former directors or officers, employees, agents, or any person who may have served at its request or by its election as a director or officer of another corporation or association, or his heirs, executors and administrators against expenses (including attorneys' fees, judgments, fines and amounts paid in settlement) actually and necessarily incurred by them in connection with the defense or settlement of any action, suit or proceeding in which they, or any of them, are made parties or a party, by reason of being or having been directors or a director, officer, employee or agent of the Corporation, or of such other

corporation or association, except in relation to matters as to which any such director or association, except in relation to matters as to which any such director or officer or person shall be adjudged in such action, suit or proceeding to be liable for willful misconduct in the performance of duty and to such matters as shall be settled by agreement predicated on the existence of such liability. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the person engaged in willful misconduct or in conduct in any way opposed to the best interests of the Corporation. The provisions of this section are severable, and therefore, if any of its

provisions shall contravene or be invalidated under the laws of a particular state, country or jurisdiction, such contravention or invalidity shall not invalidate the entire section, but it shall be construed as if not containing the particular provision or provisions held to be invalid in the particular state, country or jurisdiction, and the remaining provisions shall be construed and enforced accordingly. The foregoing right of indemnification shall be in addition to and not exclusive of all other rights to which such director, officer, employee or agent may be entitled.

ARTICLE X

Officers

Section 1. Officers

The officers of the ACADEMY shall be as follows: President, First Vice-President, Second Vice-President, Treasurer, Treasurer-

Elect, Secretary, Secretary-Elect, Librarian-Historian. Each officer shall serve for a one (1) year term of office or until his successor has been duly elected and qualified or automatically advanced to the next higher office hereinafter provided. The President, First Vice-President, Second Vice-President, Secretary-Elect and Treasurer-Elect are ineligible for reelection to succeed themselves. No Fellow shall serve for more than four (4) consecutive years in any elected office.

Section 2. Election Procedure

There shall be a nominating Committee organized in accordance with Article XI of these By-Laws. The Nominating Committee shall present recommended nominees at a subsequent business session for consideration of those in attendance. Additional nominations may be made from the floor.

Election of officers shall be held by ballot of those Fellows present and the majority shall elect. No proxy vote, by a Fellow otherwise entitled to vote, who is not present at that business session shall be allowed. Each Fellow who is present at said business session shall be entitled to one (1) vote for each officer or member of the Board of Directors, committed members, or representatives to the American Board of Orthopaedic Surgery to be elected. Cumulative voting, placing all votes for one (1) particular candidate, is specifically prohibited.

The term of office for those elected during the period of the annual meetings shall commence at the time that the First Vice-President succeeds to the office of President and the Second Vice-President

succeeds to the office of First Vice-President.

Section 3. President

The President shall be the principal executive officer of the Corporation and shall, in general, supervise and control all the business affairs of the Corporation. He shall preside at all general meetings of the ACADEMY and of the Board of Directors. He may sign, with the Secretary or any other proper officer or agent of the Corporation authorised by the Board of Directors, any deeds, mortgages, bond contracts or other instruments which the Board of Directors has authorised to be executed, except in cases where the signing and execution thereof shall be expressly delegated to the Board of Directors or by these By-Laws or by the Statutes to some other officer or agent

of the Corporation; he shall appoint any regular or special committee or committees not otherwise provided for in the By-Laws with the approval of the Board of Directors and shall be an ex-officio member, without vote, of all committees except the Admissions, Resolutions, and Nominating Committees. He may fill any vacancies which may occur in any committee of the ACADEMY during the interim between annual business meetings, subject to the approval of the Board of Directors at its next meeting, unless vacancies are to be filled as otherwise specified. He is authorised to act in the event of any contingency or emergency not covered by the By-Laws. He shall, in general, perform all duties incident to the office of President and such other duties as may be prescribed by the Board of Directors from time to time.

Section 4. First Vice-President

In the absence of the President or in the event of his death, inability or refusal to act, the First Vice-President shall perform the duties of the President and when so acting shall have the powers of and be subject to all the restrictions upon the President. The First Vice-President shall succeed to the office of President during the period of the annual meetings or in the event of the death, inability or refusal to act of the President. In the event the First Vice-President succeeds to the office of President by reason other than natural succession by expiration of the current President's term of office, the First Vice-President shall serve for the remaining unfulfilled term of the replaced President and further serve for the one (1) year term of office

as President that he would have succeeded to if the current President had fulfilled his term of office. The first Vice-President shall be an ex-officio member, without vote, of all committees, except the Admissions, Resolutions, and Nominating Committees. He shall deliver an address during the period of the annual meeting at which he assumes the Presidency.

Section 5. Second Vice-President

The Second Vice-President shall, in the absence of the First Vice-President or in the event of his death, inability or refusal to act, perform the duties of the First Vice-President and when so acting, shall have all the powers and be subject to all the restrictions upon the First Vice-President. The Second Vice-President shall succeed to the office of the First Vice-President during the period of the

annual meetings or in the event of the death, inability or refusal to act of the First Vice-President. In the absence, death, inability or refusal to act of both the President and First Vice-President, the Second Vice-President shall perform the duties of the President and when so acting, shall have the powers of and be subject to all restrictions upon the President. The Second Vice-President shall perform such other duties as from time to time may be assigned to him.

Section 6. Treasurer

The Treasurer shall be in charge, have custody of and be responsible for any and all funds and securities of the Corporation and other assets of the ACADEMY and shall post a bond at the expense of the ACADEMY for the faithful discharge of his duties in said sum and with such surety or sureties

as the Board of Directors shall determine. He shall receive and give receipts for monies due and payable to the Corporation from any source whatsoever and deposit all such monies in the name of the Corporation in such banks, trust companies or other depositories as shall be selected in accordance with the provisions of Article XX of these By-Laws. He shall collect all funds and dues as provided for in these By-Laws and shall deposit them in such bank or banks as heretofore provided.

Specially allocated funds, such as research grants and specific contributions, shall be kept separate from the general fund.

All routine expenditures, not to exceed the limits established by the Board of Directors, shall be paid by the Treasurer out of the general fund. Any expenditure

exceeding said limit shall require prior approval of the Board of Directors.

The accounts of the Treasurer shall be audited annually by a Certified Public Accountant for the past fiscal year. The Treasurer shall keep itemized accounts of receipts and expenditures and present an audited report at the annual business meeting, such report to include the annual audit of accounts and statements of the financial condition of the ACADEMY. He shall be responsible for the preparation of an annual budget for submission to the Board of Directors.

The Treasurer shall perform all duties incident to the office of Treasurer and such other duties as from time to time may be assigned to him by the President or the Board of Directors.

The treasurer shall serve for a one

(1) year term of office and be eligible to succeed himself for an additional two (2) one (1) year terms as Treasurer upon re-election to the office at successive annual business meetings. However, after serving for a term of three (3) years as Treasurer of the ACADEMY, exclusive of any time spent as Treasurer-Elect, the Treasurer shall not be eligible to succeed himself.

Section 7. Treasurer-Elect

At the annual business meeting preceding the mandatory retirement of the current Treasurer, a Treasurer-Elect shall be elected to succeed to the office of Treasurer upon the expiration of the incumbent Treasurer's term of office. The Treasurer-Elect, in the absence of the Treasurer or in the event of his inability or refusal to act, shall perform the duties and be subject to all restrictions upon

the Treasurer. The Treasurer-Elect shall serve as a ex-officio member of the Board of Directors without vote. The Treasurer Elect shall perform such other duties as from time to time may be assigned to him by the President or the Board of Directors.

Section 8. Secretary

The Secretary shall keep the minutes of all meetings of the ACADEMY and the Board of Directors in one or more books provided for that purpose; see that all notices are duly given in accordance with the provisions of these By-Laws or as required by law; be custodian of the corporate records and of the Seal of the Corporation and see that the Seal of the Corporation is affixed to all documents, the execution of which on behalf of the Corporation under its Seal is duly authorised in accordance with the provisions of

these By-Laws.

He shall keep a register of the Post Office address of each Fellow or Member which shall be furnished to the Secretary by such Fellow or Member. He shall forward to each Fellow or Member of the ACADEMY an annual directory. He shall maintain the correspondence of the ACADEMY. He shall keep a record of the names of the Fellows, Members, guests and visitors in attendance at any meeting of the ACADEMY. He shall prepare an annual report for publication and distribution to the membership.

He shall notify applicants of their election to Fellowship and Membership in the ACADEMY and notify nominees of their election to office or of their appointment to committees.

He shall prepare certificates of Fellowship and Membership for presentation

to the newly elected Fellows and Members. He shall immediately notify the Treasurer of any changes of Fellowship and Membership in the ACADEMY. He shall in general perform all duties incident to the office of Secretary and such other duties as from time to time may be assigned to him by the President or the Board of Directors.

The Secretary shall serve for a one (1) year term of office and be eligible to succeed himself for an additional two (2) one (1) year terms as Secretary upon re-election to the office at successive annual business meetings. However, after serving for a term of three (3) years as Secretary of the ACADEMY, exclusive of any time spent as Secretary-Elect, the Secretary shall not be eligible to succeed himself.

Section 9. Secretary-Elect

At the annual business meeting preceding the mandatory retirement of the current Secretary, a Secretary-Elect shall be elected to succeed to the office of Secretary upon the expiration of the incumbent Secretary's term of office. The Secretary-Elect, in the absence of the Secretary or in the event of his inability or refusal to act, shall perform the duties and be subject to all restrictions upon the Secretary. The Secretary-Elect shall serve as an ex-officio member of the Board of Directors without vote. The Secretary-Elect shall perform such other duties as from time to time may be assigned to him by the President or the Board of Directors.

Section 10. Librarian--Historian

The Librarian-Historian shall be responsible for the historic records of the

ACADEMY and shall keep an account of the ACADEMY'S activities. He may be a liaison representative to other organizations and assume other duties as shall be determined by the Board of Directors.

The Librarian-Historian shall serve for one (1) year term of office and be eligible to succeed himself for an additional three (3) one (1) year terms as Librarian-Historian upon re-election to the office at successive annual business meetings. However, after serving for a term of four (4) years Librarian-Historian of the ACADEMY, he will not be eligible to succeed himself.

Section 11. Vacancies

A vacancy in any office because of death, resignation, refusal to a removal or disqualification, or otherwise, may be filled by the Board of Directors until a

successor is duly elected and qualified, unless otherwise provided by these By-Laws.

ARTICLE XI

Elected Committees

Section 1. Classification and Organization

The elected committees of the ACADEMY shall be as follows:

Nominating Committee

Admissions Committee

Section 2. Nominating Committee

The Nominating Committee shall consist of seven (7) Active Fellows who are not directors, six (6) of whom shall be elected at the first session of each annual business meeting following nominations from the floor. The seventh member shall be selected by the Board of Directors and shall act as Chairman. No Fellow may serve two (2) consecutive years on the Nominating Committee.

The Nominating Committee shall prepare a list of those nominees selected for the following offices: Second Vice-President, Secretary-Treasurer, Librarian-Historian, At-Large-Members of the Board of Directors, Representatives to the American Board of Orthopaedic Surgery, a member of the Admissions Committee, and during the last year in office immediately preceding the retirement of either the Secretary or the Treasurer, it shall also nominate a Secretary-Elect and/or Treasurer-Elect, as the case may be.

In the event of the death of both the First Vice-President and Second Vice-President, the Nominating Committee which was elected at the most recent annual business meeting shall select a nominee for the office of First Vice-President. The nomination shall be presented to the Board of

Directors which shall have the power to elect the nominee to office or to reject said nominee and request the Nominating Committee to submit an alternative nominee.

Section 3. Admissions Committee

The Admissions Committee shall consist of five (5) Active Fellows, each of whom shall serve for one (1) five (5) year term of office. The terms of office of said members shall be staggered, that is, one member shall be retired each year and a new member elected. The Chairman and Secretaries of the Admissions Committee shall be selected by the Board of Directors. The Admissions Committee shall be responsible for the selection of those applicants to be recommended for election as either Fellows or Members of the ACADEMY, of whatever classification, except as when

otherwise provided herein. The Admissions Committee shall be responsible for verifying the professional credentials of each applicant as well as his moral and ethical standards.

All completed applications shall be forwarded by the Secretary of the ACADEMY to the Admissions Committee which will then refer said applications to the appropriate Regional Admissions Committee.

The Admissions Committee shall conduct whatever investigation, personal interviews, or inquiries it deems necessary to determine the qualifications of an applicant. Each member of the Admissions Committee shall treat all applications and information obtained during any interview or inquiry as privileged and confidential and shall not make any public disclosure or publication of said informa-

tion except to the Board of Directors as heretofore provided.

ARTICLE XII

Regional Admissions Committees

Section 1. Regional Admissions Committees

There shall be Regional Admissions Committees, the geographic distribution, composition and organization of which shall be established by, and shall be changed at the discretion of the Board of Directors. Each annual report shall contain the geographic distribution and organization of the Regional Admissions Committees as established by the Board of Directors. (See Appendix II)

Section 2. Duties

The duties of the Regional Admissions Committees shall be:

(1) To select from the candidates in their regions those meeting the

requirements for Fellowship, Associate Membership -- Allied Specialties, and Associate Membership -- Basic Sciences. Each Regional Admissions Committee shall forward to the Admissions Committee all membership applications referred to the committee along with appropriate recommendations on each application.

(2) To carry out the membership policies of the Board of Directors and of the Admissions Committee.

ARTICLE XIII

Board of Councilors

Section 1. Board of Councilors

There shall be a Board of Councilors, the geographic distribution, composition and organization of which shall be

established and modified, as necessary, by the Board of Directors.

Section 2. Function and Duties

It is the function of the Board of Councilors to provide a mechanism for greater opportunity of involvement and participation in ACADEMY affairs by Fellows and Members through individual initiative and improve communications and disseminations of ACADEMY policy within the individual states. The duties of the Board of Councilors shall include, but not be limited to, the identification of problems affecting orthopaedics, the development of recommendations to be submitted to the Board of Directors of the ACADEMY for the alteration, modification or change of ACADEMY policy, to assist in the execution and implementation of ACADEMY policy within the individual states

or regions and, in general, to be advisory to the Board of Directors of the ACADEMY.

Section 3. Membership

Each state shall have a minimum of one (1) councilor to serve the Board of Councilors. Additional councilors from individual states or geographic regions shall be elected based upon geographic and numerical ratios determined by the Board of Directors of the ACADEMY. (See Appendix III)

Section 4. Regional, State, or Local Societies and Organizations

The organizational structure of regional, state, or local societies of the Board of Councilors shall be determined locally, subject to approval of the Board of Directors of the ACADEMY. Orthopaedic surgeons at a state level may develop a local organization or may

select existing state organizations for the purpose of nominating and electing concilors. The mechanism for such election shall be determined by the state or local organizations. The nominated elected state or regional representative to serve on the Board of Councilors must be a Fellow of the ACADEMY.

Section 5. Tenure

The initial tenure of the elected Board of Councilors shall be determined by the Board of Directors of the ACADEMY and shall run from one (1) to three (3) years apportioned upon geographic and numerical relations to obtain a staggered tenure for the Board of Councilors. Thereafter, a term of membership on the Board of Councilors shall be for three (3) years and each councilor will be eligible for re-election for one (1)

additional three (3) year term.

Section 6. Officers

The Board of Councilors shall elect its own officers, namely: Chairman, Chairman-Elect and Secretary. Each officer shall be elected for a one (1) year term, and the Secretary may succeed himself for an additional one (1) year term. Each officer shall serve as a member of the Board of Directors during his term in office. The Chairman-Elect shall succeed to the office of Chairman immediately upon the expiration of the term of office of the Chairman or in the event of the death, inability, or refusal to act of the Chairman. In the event the Chairman-Elect succeeds to the office of Chairman by reason other than natural succession by expiration of the current Chairman's term of office, the

Chairman-Elect shall serve for the remaining unfulfilled term of the replaced Chairman and further serve for the one year term of office as Chairman that he would have succeeded to if the current Chairman had fulfilled his term of office.

Section 7. Standing Committees

The Board of Councilors shall have two (2) standing committees as follows:

(1) Administrative Committee: The Administrative Committee shall be composed of the Chairman, Chairman-Elect and Secretary plus two (2) Members-At-Large who are elected from the Board of Councilors with staggered terms of office of two (2) years. This committee shall conduct the affairs of the Board

of Councilors between its meetings.

(2) Nominating Committee: The Nominating Committee shall consist of three (3) Active Fellows who are not Directors, Officers of the Board of Councilors, or members of its Administrative Committee, two (2) of whom shall be elected from the Board of Councilors at its annual meeting following nominations from the floor. The third member shall be selected by the Chairman of the Board of Councilors and shall act as Chairman. No Fellow may serve two (2) consecutive years on the Nominating Committee. The Nominating Committee shall

prepare a list of those nominees selected to serve as officers of the Board of Councilors and members of its Administrative Committee.

Section 8. Other Committees

Committees, not otherwise provided for, may be appointed by the Board of Councilors to fill its needs with the approval of the Board of Directors of the ACADEMY.

ARTICLE XIV

Meetings and Vote of the Membership

Section 1. Annual Business Meeting

An annual business meeting shall consist of at least two sessions and shall take place at such time and place as designated by the Board of Directors. Only Fellows and others designated by the Board of Directors and necessary ACADEMY

staff shall attend the annual business meeting.

Section 2. Ceremonial Meetings

Ceremonial meetings may be scheduled by the Board of Directors in conjunction with the annual meetings. Any person registered to attend the annual scientific meeting may attend these meetings.

Section 3. Annual Scientific Meeting

The annual scientific meeting shall consist of the educational scientific programs and exhibits and shall be scheduled by the Board of Directors to coordinate with the annual business meeting.

Eligibility for attendance by any person at the annual scientific meeting shall be designated by the Board of Directors.

Section 4. Other Meetings

Sectional or regional meetings may be held with the approval of the Board of Directors.

Section 5. Special Meetings

A special business meeting of the Fellows may be called by the President of the ACADEMY or by resolution of the Board of Directors. Special business meetings of the Fellows may also be called by written petition signed by at least one-twentieth (1/20th) of those Fellows entitled to vote at such meeting. The petition of the Fellows shall be submitted to the Secretary of the ACADEMY who shall fix a date for said special business meeting which shall be not less than forty-five (45) days nor more than ninety (90) days from date of receipt of petition by the Secretary. The time,

place and location of said meeting shall be fixed by the President of the ACADEMY.

Section 6. Quorum and Manner of Acting

Business may be conducted only when a quorum is present. A quorum shall consist of those Fellows present and eligible to vote at any annual or special business meeting of the ACADEMY, but in no event shall a quorum consist of less than one hundred (100) Fellows eligible to vote. Except in cases as otherwise provided in these By-Laws, a majority of votes will constitute an action of the membership.

Section 7. Vote of the Membership

Voting rights as specified by these By-Laws shall be exercised by the Fellow in person. No proxy vote by a Fellow otherwise entitled to vote, who is not present in person at the business session

or committee meeting, shall be allowed. Cumulative voting, to place all votes for a particular candidate, is specifically prohibited. Whenever within these By-Laws a member of a committee is specified to be ex-officio, it is specifically understood that said ex-officio member shall not have the right to vote unless otherwise specified by the Board of Directors. Only committee members duly appointed or elected shall be entitled to vote within the committee.

Section 8. Conduct of the Annual or Special Business Meetings

(1) The Board of Directors shall determine prior to the meeting the order of business;

(2) In the event the Fellows shall approve a motion for a ballot vote, such motion shall be

implemented in accordance with whatever written, mechanical or electronic method the Board of Directors has previously approved;

(3) The Presiding Officer may appoint such tellers as he deems necessary.

ARTICLE XV

Amendments

Section 1. By-Laws Committee

The President, with the approval of the Board of Directors, shall appoint a By-Laws Committee.

Section 2. Procedure

Proposed amendments to these By-Laws or to the Articles of Incorporation of the ACADEMY must be submitted in writing by (5) Fellows to the Secretary not less than ninety (90) days prior to the next annual business meeting for review and

recommendations. The porposed amendments shall be referred to the By-Laws Committee for review and recommendations. The recommendations of this committee shall be read at a business session at the next annual business meeting. No action on proposed amendments shall be taken until the next succeeding annual business meeting. A copy of proposed amendments shall be sent to each Fellow at least one (1) month preceding the annual business meeting at which the proposed amendments will be voted upon. At that annual business meeting, the proposed amendments shall be submitted for a vote of those in attendance. Amendments to these By-Laws, or to the Articles of Incorporation of the ACADEMY require the affirmative vote of three-fourths (3/4ths) of those Fellows present and voting.

Section 3. Amendments

Any change in the corporate or tax status of the Corporation can by any modification, repeal, or amendment of any currently existing or corporate legislation, whether federal, state, or local, or the adopted imposition or implementation of any statute, ordinance, rule administrative or judicial decision or decree which in the discretion of Board of Directors requires immediate amendment of the By-Law Articles of Incorporation shall, notwithstanding the preceeding Section empower the Board of Directors to amend the Articles of Incorporation or these By-Laws, in any respect they deem necessary to insure company compliance with the change or changes in the law, without any prior approval of the voting Fellowship.

ARTICLE XVI

Resolutions

Section 1. Resolutions Committee

The President, with approval of the Board of Directors, shall appoint a Resolutions Committee at least ninety (90) days prior to the annual business meeting, and whenever practical, said committee shall be listed in the program for the annual meetings.

Section 2. Requirements of a Resolution

Any resolution proposed by a Fellow shall be submitted in writing to the Secretary of the ACADEMY, at least ninety (90) days prior to the annual meeting and signed by at least five (5) Fellows and designated as a resolution. A copy of the proposed resolution shall be forwarded to the membership at least thirty (30) days prior to the annual meeting.

The Secretary shall forward a copy of a duly submitted resolution to the Resolutions Committee and the Board of Directors. The Board of Directors or the sponsors of the resolution may forward comments or suggestions to the Resolutions Committee provided that a copy is also forwarded to the sponsors or the Secretary of the Board of Directors, as the case may be.

The Resolutions Committee may solicit such comments as it deems necessary from the Board of Directors, the sponsors or other third persons. A copy of correspondence from the Resolutions Committee and the replies thereto shall be sent to the sponsors and to the Secretary of the Board of Directors.

Section 3. Review

All resolutions adopted by the Fellow-

ship after the close of the annual me ing in 1980 shall be reviewed by the Board of Directors within five (5) years from the date of their adoption unless the resolution specifically provides otherwise. If the Board of Directors determines that an existing resolution is inappropriate or otherwise requires modification, it shall submit appropriate suggestions in the form of a resolution for consideration at an annual business meeting.

Section 4. Hearings

During the time of the annual business meeting of the ACADEMY, the Resolutions Committee shall hold an open hearing at which time all duly submitted resolutions may be discussed. The time and location of the open hearing shall be announced to the Fellowship and, if possible, listed

in the program. Any Fellow of the ACADEMY may appear before the Resolutions Committee to present his views. Subsequent to such hearing, the Committee is authorized to consult with any parties it deems necessary to prepare its report to the Fellowship. At a subsequent business session, the Chairman of the Resolutions Committee shall present a report and move its adoption. Any resolution duly adopted as prescribed above shall be binding upon the Board of Directors which shall be responsible for the prompt implementation of such resolution. The Secretary of the ACADEMY shall cause a written report to be sent to the Fellowship as soon as practicable describing the implementation undertaken.

Section 5. Motions

The Presiding Officer may, at his discretion, refer any motion duly made and seconded to the Resolutions Committee for recommendations to be presented at the next annual meeting.

ARTICLE XVII

Fees and Dues

Section 1. Initiation Fees

An initiation fee, the amount of which shall be determined by the Board of Directors, shall be paid by all Active Fellows and by such members, of whatever classification, as determined by the Board of Directors.

Section 2. Annual Dues

Annual dues, in amounts to be determined by the Board of Directors, shall be paid by Active Fellows and all classifications of members, to the Treasurer

at such time as he may demand except as otherwise provided.

Section 3. Exemption from Dues

Exemption from dues shall be determined by the Board of Directors.

Section 4. Dues for Reciprocal Members

Annual dues in an amount to be determined by the reciprocal agreement between the ACADEMY and the foreign orthopaedic associations shall be paid by Reciprocal Members to the Treasurer of the ACADEMY at the same time as required of other Fellows and Members.

Section 5. Registration Fee

There shall be a registration fee for the annual meetings, the amount of which shall be determined by the Board of Directors.

ARTICLE XVIII

Rules of Order

In the absence of any provision in these By-Laws, all meetings of the ACADEMY, the Board of Directors, the Board of Councilors, and duly appointed councils or committees shall be governed by standard parliamentary procedure which provides for adequate notice and an opportunity for debate. The Presiding Officer may be guided by, but not bound by, the most current edition of Robert's "Rules of Order."

ARTICLE XIX

Dissolution

In the event of dissolution or final liquidation of the ACADEMY, all of its assets remaining after payment of its obligations shall have been made or provided for, shall be distributed to and

among such corporations, foundations, or other organizations operating exclusively for scientific and educational purposes consistent with those of the ACADEMY and shall be designated by the Board of Directors.

ARTICLE XX

Contracts, Checks, Deposits and Funds

Section 1. Contracts

The Board of Directors may authorize any officer or officers, agent or agents of the Corporation, in addition to the officers so authorized by these By-Laws, to enter into any contract or execute and deliver any instrument in the name of and on behalf of the Corporation and such authority may be general or confined to specific instances.

Section 2. Checks, Drafts, Etc.

All checks, drafts, or other orders

for the payment of money, notes or other evidence of indebtedness issued in the name of the Corporation, shall be signed by such officer or officers, agent or agents of the Corporation and in such manner as shall be determined by action of the Board of Directors.

Section 3. Deposits

All funds of the Corporation shall be deposited to the credit of the Corporation in banks, trust companies, or other depositories as the Board of Directors may select.

Section 4. Gifts

The Board of Directors may accept on behalf of the Corporation any contribution, gift, bequest, or devise for the general purposes or for any special purpose of the Corporation.

ARTICLE XXI

Books and Records

The Corporation shall keep correct and complete books and records of account and shall also keep minutes of the proceedings of the business meetings. Board of Directors and committees having any of the authority from the Board of Directors, and shall keep at the registered or principal office a record giving the names and addresses of Fellows entitled to vote.

ARTICLE XXII

Fiscal Year

The Board of Directors shall define the fiscal year.

ARTICLE XXIII

Seal

The Board of Directors shall provide a corporate seal which shall be in the

form of a circle and shall have inscribed thereon the name of the Corporation.

ARTICLE XXIV

Waiver of Notice

Whenever any notice is required to be given under the provisions of the General Not For Profit Corporation Act of Illinois or under the provisions of the Articles of Incorporation or the By-Laws of the Corporation, a waiver thereof in writing signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to the giving of such notice.

ARTICLE XXV

Affiliates of the Academy

Section 1. Organizations

The ACADEMY may upon request from time to time grant affiliated status to

those societies or organizations whose primary purpose and goals relate, in total or in part, to the field of orthopaedic surgery. Such organizations or societies may, upon acceptance by the ACADEMY, identify themselves as "An Affiliate of the AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS." Each society or organization which is granted affiliated status as hereinabove provided would have the right of representation to the Board of Directors of the ACADEMY by a Fellow of the ACADEMY elected in accordance with the By-Laws of the affiliate organization or society, who would serve without vote at the expense of the affiliate.

Section 2. Internal Affairs

Each organization or society granted affiliated status, is responsible for its own business and fiscal policies.

Such policies must be in compliance with the ACADEMY's Articles of Incorporation, By-Laws, rules and regulations in force and effect. Any action by an affiliate, contrary to the Articles of Incorporation, By-Laws, or Rules and Regulations of the ACADEMY will be sufficient ground for terminating the affiliated status.

Membership in the affiliate organization will be determined by its own rules and regulations. However, a non-member of the ACADEMY may not claim fellowship or membership rights in the ACADEMY through an affiliate membership and may not serve as representative of the affiliate organization to the Board of Director of the ACADEMY.

No publication or public statement may be issued by an affiliate organization with implied or direct sponsorship of the

ACADEMY unless prior written approval from the Secretary of the ACADEMY for sponsorship of the publication or public statement is first obtained.

APPENDIX I

Appointment and Powers of Executive Director

A. Appointment

The Board of Directors shall appoint an Executive Director who shall serve as the chief executive full time official of the Academy to manage and direct the activities of the Academy.

B. Delegation of Authority and Basic Powers and Responsibilities

The Executive Director is hereby delegated the authority to act for and on behalf of the Academy to provide all administrative services by maintaining the offices of the Academy with power to hire, fire or promote employees

of the Academy, contract for administrative or ministerial services to the Academy and to contract on behalf of the Academy for the rendering of necessary services, supplies, facilities and like matters up to a dollar limit as shall be prescribed from time to time by the Board of Directors. The Executive Director shall be authorized to delegate to any other employee such other responsibilities as he shall from time to time deem appropriate. The Executive Director shall be authorized to sign on behalf of the Academy all tax returns, certificates, and other documentations required by State, Local or Federal Government or agencies thereof. He shall be authorized to speak on behalf of the Academy in the name of the Academy

on such issues for which policy decisions have been made by the Board of Directors. He shall be responsible for providing leadership to educational and other activities of the Academy, and shall provide representation for the Academy to outside organizations.

APPENDIX II

Regional Admissions Committees

A. Representation

Representation on the Regional Admissions Committees shall be based on Academy membership as follows: One (1) representative for each state within the region; one (1) representative for the District of Columbia; one (1) representative for Puerto Rico; and one (1) representative for each of the geographically

appropriate areas in the Canadian Provinces. In addition, the total membership of each Regional Admissions Committee shall be proportionate to the number of Academy members within the region on the basis of one (1) representative for each unit of 50 members, or each additional major fraction thereof.

B. Selection of Members of Regional Admissions Committees

The representatives on the Regional Admissions Committees shall be appointed by the President, subject to the approval of the Board of Directors to serve for staggered terms of three (3) years each, and may be reappointed for one (1) additional three (3) year term. No representative shall serve on a Regional Admissions Committee

for more than six (6) consecutive years except that the Board of Directors shall provide for the varying terms necessary to give effect to this provision.

C. Election of Officers

The Chairman of each Regional Admissions Committee shall be elected by the membership of the Regional Admissions committee at its annual meeting to serve for a term of one (1) year but shall not be eligible to serve as Chairman for more than three (3) separate terms.

APPENDIX III

Board of Councilors

A. Representation

Representation on the Board of Councilors shall be based on Academy membership as follows: at least one

(1) representative for each state, the District of Columbia, U. S. Territories, and Canada. Total representation shall be proportionate to the number of Academy members within each on the basis of one (1) representative for each unit of 125 members, or each additional major fraction thereof.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D., and MICHAEL R. TREISTER, M.D.,	)	
Plaintiffs,	)	
vs.	)	NO. 80 C 1405
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
Defendant.	)	

MOTION TO DISMISS

The American Academy of Orthopaedic Surgeons (hereinafter "Academy") moves the Court to dismiss the Complaint against it for failing to state a claim upon which relief can be granted. In addition, the Academy moves to dismiss the action by reason of the res judicata and collateral estoppel effect of a prior suit on the same claim which was recently adjudicated through a final judgment of dismissal with

prejudice. In support of its motion, the Academy states as follows:

1. The two plaintiffs are both medical physicians practicing in the field of orthopaedic surgery. Each is licensed as a physician, each is board certified as an orthopaedic surgeon by the recognized credentialling body, each enjoys medical staff privileges at several hospitals in the different geographic areas where they conduct their respective practices Dr. Marrese in Evansville, Indiana and Dr. Treister in Chicago, Illinois), and each is a member of several medical societies including societies of orthopaedic surgeons.

2. The Academy is a voluntary professional society of orthopaedic surgeons that sponsors continuing medical education programs of interest to physicians prac-

ticing in the field. All educational and scientific activities of the Academy are available to any physician, including each plaintiff, as an attendee and as a lecturer, and upon information each plaintiff has participated in or attended educational programs of the Academy.

3. Each plaintiff separately applied for membership in the Academy. In 1976, Dr. Treister was not elected to membership in the Academy, and in 1977, Dr. Marrese was not elected to membership in the Academy. After rejection of an initial application, each applicant for Academy membership must wait 3 years before re-applying.

4. In 1976, Dr. Treister commenced a lawsuit against the Academy in the Circuit Court of Cook County, Illinois, seeking a declaratory judgment that consideration by the Academy of his membership application must incorporate certain procedures. Dr. Treister's Complaint also alleged damages in the amount of $10 million. A true copy of Dr. Treister's complaint, entitled Treister vs. American Academy of Orthopaedic Surgeons, Civil Action No. 76 L 20052 (Cir. Ct. Cook Co., Ill.) is attached hereto as Exhibit A.

5. In 1978, Dr. Marrese commenced a lawsuit against the Academy in the Circuit Court of Cook County, Illinois, seeking a declaratory judgment that consideration by the Academy of his membership application must incorporate certain procedures. A true copy of Dr. Marrese's complaint, entitled Marrese vs. American Academy of Orthopaedic Surgeons, Civil Action No. 78 L 16328 (Cir. Ct. Cook Co., Ill.) is attached hereto as Exhibit B.

6. On October 31, 1979, the Illinois Appellate Court filed its Opinion dismissing with prejudice Dr. Treister's complaint against the Academy for, inter alia, its failure to allege facts showing that membership in the Academy is an "economic necessity," that such membership is not a requisite to hospital staff privileges, and that such membership is not necessary for board certification or licensure to practice medicine as an orthopaedic surgeon. Following the decision of the Illinois Appellate Court, the Illinois Supreme Court denied Dr. Treister's Petition for Leave to Appeal and the Appellate Court issued its mandate directing that the case be dismissed with prejudice. A true copy of the Opinion of the Illinois Appellate Court in Treister vs. American Academy of Orthopaedic Surgeons, 78 Ill. App. 3d 746,

396 N.E.2d 1225, 33 Ill.Dec. 501 (1st Dist. 1979) is attached hereto as Exhibit C.

7. Because of the pendency of an appeal in the Treister case, in 1978 the Circuit Court of Cook County, Illinois stayed proceedings on the Academy's motion to dismiss the Marrese complaint. On April 17, 1980, the Circuit Court ruled on the Academy's motion and dismissed the Marrese complaint on the grounds cited by the Illinois Appellate Court in its Treister opinion.

8. The Complaint herein pleads the same cause of action alleged by Dr. Marrese and by Dr. Treister in their previous complaints filed in the Circuit Court of Cook County, Illinois. Each issue of fact which is raised by the Complaint here was raised, or could have been raised in the state court litigation which is now concluded.

9. This action against the Academy is barred by principles of res judicata in that issue of fact which has been asserted here was, or could have been, litigated in the prior state court litigation which was adjudicated to a final order of dismissal on the merits.

10. This Complaint fails to state a claim on which relief may be granted in that the plaintiffs are collaterally estopped from asserting that the Academy's decision to exclude them from membership resulted in economic injury, since this same issue was determined adversely to plaintiffs in the prior state court action.

11. This Complaint fails to state a claim upon which relief can be granted in that it does not allege any act or event of the Academy as to which the lack of membership would exclude them. For

example, the simple refusal of membership, absent an actual denial of participation in educational or informational programs of the Academy, does not state a claim for "boycott" under the federal antitrust laws.

12. This Complaint fails to state a claim upon which relief can be granted in that the Academy's selection of members is, as to each applicant, a unilateral decision about the persons with whom the Academy will deal on certain terms (i.e., as full members, rather than as non-member physicians interested in orthopaedic surgery).

13. This Complaint fails to state a claim upon which relief can be granted in that neither plaintiff has been injured in his business or property interests by the denial of his respective membership application to the Academy.

14. This Complaint fails to state a claim upon which relief can be granted in

that it fails to allege facts giving rise to actual injury to either Dr. Marrese or Dr. Treister.

15. This Complaint fails to state a cause of action upon which relief can be granted in that the right of the Academy to accept or exclude applicants according to criteria of its choosing is protected by the First and Fourteenth Amendments to the U. S. Constitution. The right to Freedom of Association establishes the rights of the Academy and its individual members to preserve the anonymity and confidentiality of their investigation and deliberations regarding the election of new members to the Academy.

16. This Complaint fails to state a cause of action upon which relief can be granted in that the right to Freedom of Association may only be abridged where a

compelling state interest has first been demonstrated that overrides and thereby justifies restriction of the First Amendment Rights. Any abridgement of the Academy's right (a) to select its own members by criteria of its own choosing, and (b) to preserve the confidentiality of the investigative and deliberation procedure of electing new members, must derive from a superceding state interest in protecting an existing right of the plaintiffs which would otherwise be impaired.

17. This Complaint fails to state a cause of action upon which relief can be granted in that plaintiffs have pleaded no existing right that is impaired by failing to become members of the Academy. The determination of the Illinois Appellate Court that membership in the Academy is not an "economic necessity" to practice by

board certified orthopaedic surgeons is dispositive of any issue that the plaintiffs might be able to assert concerning any identifiable economic right from which it could be argued that the First Amendment Rights of the Academy and its members should be impaired.

Wherefore, the American Academy of Orthopaedic Surgeons respectfully prays the Court to enter judgment in its favor and against Doctors Marrese and Treister, dismissing this suit and awarding it the costs of this action.

AMERICAN ACADEMY OF
ORTHOPAEDIC SURGEONS

BY: _____
One of its Attorneys

Thomas M. Crisham
Robert E. Nord
Pamela S. Hollis
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(Mailing Certificate of
Service omitted in printing)

EXHIBIT A

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MICHAEL R. TREISTER, M.D.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 76L 20052
	)	
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	
	)	
Defendant.	)	

C O M P L A I N T

MICHAEL R. TREISTER, M.D., Plaintiff, by his attorneys, FOSS, SCHUMAN & DRAKE, hereby complains of AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, Defendants, as follows:

COUNT ONE - DECLARATORY JUDGMENT

1. Plaintiff, MICHAEL R. TREISTER, M.D., is an orthopaedic surgeon duly licensed to practice medicine and surgery in the State of Illinois and is practicing orthopaedic surgery in the State of Illinois. Plaintiff is now and has since 1974 been

been certified by the American Board of Orthopaedic Surgery.

The following are representative of Plaintiff's professional association memberships and professional association positions:

Fellow
Philippine Orthopaedic Association

Fellow
Western Pacific Orthopaedic Association

Member
Orthopaedic Research Society

Director
Chicago Foundation for Medical Care

Director
Illinois Foundation for Medical Care

Member
Finance Committee
Illinois Foundation for Medical Care

Chairperson
Grievance Committee
Chicago Medical Society

Vice-Chairperson
Peer Review Committee
Chicago Medical Society

Key-Man Legislative Representative
Illinois State Medical Society

Member
Illinois Medical-Political
Action Committee

The following are representative of

Plaintiff's professional appointments:

Volunteer
CARE - Medico
Santa Domingo, Dominican Republic (1975)

Attending Physician
Chicago Golden Gloves

Chief Physician
Illinois State Boxing Team
Illinois Amateur Athletic Union

Chief Physician
U.S. National Boxing Team
U.S. Amateur Athletic Union
Eastern European Tour (1976)

Aviation Medical Examiner
Federal Aviation Administration

The following are representative of

Plaintiff's teaching positions:

Teaching Staff
Dept. of Pediatric Orthopaedics
National Orthopaedic Hospital
of the Philippines
Quezon City
P.I. (1972-1973)

Associate Professor of
Orthopaedic Surgery
Illinois College of Podiatric
Medicine

Weekly Orthopaedic Conferences
Norwegian-American Hospital

Participant
Family Practice Training Program
St. Mary of Nazareth Hospital

The following are representative of

Plaintiff's recently-delivered papers:

"The relationship of frequent
kneeling to chondromalacia
of the patella."

"The etiology and treatment of
chondromalacia of the patella -
review of a series of patellec-
tomies and presentation of the
technique."

"The transverse process lumbrosacral fusion - description of the technique and review of a personal series of cases."

"Spina Bifida Occulta at S1 as a cause of low back pain and S1 radiculopathy - a variant of spinal canal stenosis."

"The Trauma Care System in Illinois."

"The Operative Management of the Resistant Clubfoot: The Posteromedial Release or Turco Procedure."

The following are representative of Plaintiff's recently-published works:

"The Removal of Clubfoot Casts," Clinical Orthopaedics.

"Treating the Public Aid Patient," Chicago Medicine.

Letter, "Utilization of Operating Room Time," Medical Tribune.

Plaintiff is a member of the attending staff at the following Chicago hospitals:

Edgewater Hospital
Franklin Boulevard Community Hospital
Henrotin Hospital

Norwegian-American Hospital
St. Elizabeth's Hospital
St. Mary of Nazareth Hospital
Walter Memorial Hospital

2. The Defendant, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS (hereinafter, "the Academy"), is a not-for-profit corporation. The Academy admits Board certified orthopaedic surgeons to fellowship and membership in the Academy on the basis of standards and rules adopted by the Academy and published in their by-laws. A copy of said rules and by-laws as they pertain to applications for fellowship are attached hereto as Exhibit A and incorporated herein by reference.

3. Active Fellowship in the Academy is a factor relied upon by hospitals in the granting of orthopaedic surgical privileges, by insurance companies in the setting of malpractice rates, by courts in determining the expertise of an orthopaedic

surgeon whose testimony is offered as expert, and by competent, young physicians chosing a clinic in which to practice.

4. Active Fellowship in the Academy is a practical necessity for an orthopaedic surgeon who wishes to realize maximum potential achievement and recognition in his specialty.

5. In November of 1974, Plaintiff applied for membership in the Academy by submitting an application form. A copy of a blank application form is attached to this complaint as Exhibit C and incorporated herein by reference.

6. On information and belief, the Academy then prepared a list of applicants for Active Fellowship, designated as such. This list included Plaintiff and was broadly distributed to physicians throughout the United States. The list was accompanied by a request for information

concerning the reputation and qualifications of the persons named thereon.

7. In 1976, Plaintiff received a notice stating that Dr. Louis W. Kolb would interview him as part of the processing of his application. In the interview, Dr. Kolb informed Plaintiff that there was adverse information in Plaintiff's file which Dr. Kolb predicted would cause the application to be rejected. Dr. Kolb informed Plaintiff of the general nature of the charges but did not provide sufficient detail to enable Plaintiff fairly to rebut the charges. Plaintiff correctly informed Dr. Kolb that some of the charges of which Plaintiff was told were false, in that Plaintiff did not commit the conduct alleged. Plaintiff correctly informed Dr. Kolb that the remainder of the charges of which Plaintiff was informed were

irrelevant, in that the conduct alleged was not a violation of any ethical standard, but rather, was standard practice among Active Fellows of the Academy and was performed with the knowledge and consent, and under the guidance, of at least one Active Fellow of the Academy. Plaintiff was informed of no alleged conduct which both was unethical and did occur.

8. Plaintiff asked Dr. Kolb to let Plaintiff see the file. Dr. Kolb stated that Academy regulations forbade such examination, and denied Plaintiff's request.

9. Plaintiff asked Dr. Kolb to further specify the nature of the charges so that he could rebut them. Dr. Kolb stated that Academy regulations forbade such disclosure, and denied Plaintiff's request.

10. Plaintiff asked Dr. Kolb the identity of the persons making the charges,

so that he could confront his accusers. Dr. Kolb stated that Academy regulations forbade such disclosure, and denied Plaintiff's request.

11. Plaintiff asked Dr. Kolb to cite the regulations referred to in Paragraphs 8, 9, and 10 above. Dr. Kolb denied Plaintiff's request; refused to cite any authority for denying Plaintiff's requests to see his file, to be informed of the charges against him, and to identify his accusers, as stated in Paragraphs 8, 9, and 10 above; and refused to cite any authority for refusing to cite authorities, as stated in this Paragraph.

12. At the suggestion of Dr. Kolb, Plaintiff wrote a letter, dated Feb. 6, 1976 and addressed to Dr. Kolb as agent for the Academy, attempting to rebut the charges as well as possible under the circumstances.

13. The letter referred to in Paragraph 12 concludes with a request for all available appeal rights, and for the right to be represented by counsel, in these words:

> I urge the Committee to probe these matters in depth and I shall welcome the opportunity and seek the right to participate in any such investigations. I shall also be more than happy to employ my counsel at my expense to aid the committee in this process on an administrative level. [Emph. added]

14. Plaintiff received no response to this letter. Plaintiff received no communication from the Academy or any representative thereof concerning this application until Oct., 1976, when he received a letter stating that his application had been rejected, that the matter was closed, and that he could not apply for admission again for three years. A copy of this letter is

attached to this Complaint as Exhibit D and incorporated herein by reference.

15. The procedure followed by the Academy in rejecting Plaintiff's application violated the By-Laws of the Academy as follows: Those By-Laws require the Regional Admissions Committee to "conduct a personal interview with the applicant;" but in fact the only interview conducted was by Dr. Kolb, not by the entire committee. A copy of the pertinent By-Laws appears in Exhibit A.

16. The procedure followed by the Academy in rejecting Plaintiff's application violated the By-Laws of the Academy as vollows: Those By-Laws require the Regional Admissions Committee to "make all necessary investigation to verify the credentials of the applicant and determine his qualifications," but in fact the investigation con-

ducted was not sufficient to determine the qualifications of Plaintiff, because Plaintiff was not given a fair opportunity to present his case or rebut the charges against him. A copy of the pertinent By-Laws appears in Exhibit A.

17. The procedure followed by the Academy in rejecting Plaintiff's application violated the By-Laws of the Academy as follows: Those By-Laws require every member of the Academy to abide by the Principles of Medical Ethics of the American Medical Association. One such principle requires:

> The basic principles of a fair and objective hearing should always be accorded to the physician whose professional conduct is being reviewed. These basic guarantees are: a specific charge, adequate notice of hearing, the opportunity to be present and the hear the evidence, and to present a defense...

> These principles of fair play apply in all disciplinary hearings and in any other type of hearing in which the physician may be deprived of valuable rights. Whenever physicians sit in judgement/sic/ on physicians and whenever that judgment affects a physician's reputation, professional status or livelihood, these principles of fair play must be observed...

These principles apply to the consideration of Dr. Treister's application because that consideration constituted a hearing in which Dr. Treister could be deprived of valuable rights and because that consideration was an occasion on which physicians sat in judgment on physicians. These principles were violated in that Dr. Treister was not informed of any specific charge, was given no notice or opportunity to be present when his application was to be considered, and was allowed neither to hear the evidence against him nor present a defense.

The relevant By-Law of the Academy appears in Exhibit A. The relevant principles of the American Medical Association appear in Article 15 of Section 4, Opinions and Reports of the Judicial Council, Including the Principles of Medical Ethics and Rules of the Judicial Council, Medical Ethics Department, American Medical Association (1971).

18. The rejection of Plaintiff's application violated the By-Laws of the Academy, as follows: Those By-Laws list the following conditions precedent for Active Fellowship, and no others:

1. "Active Fellowship shall be limited to those individuals who are certified by the American Board of Orthopaedic Surgery and whose medical practice is devoted exclusive to Orthopaedic Surgery..."

2. "Active Fellows must either be citizens of or in practice in the United States or Canada."

3. Active Fellows "must be certified by the American Board of Orthopaedic Surgery."

4. Active Fellows "must have engaged in the exclusive practice of orthopaedic surgery for a minimum period of three (3) years subsequent to the completion of their period of training."

5. "Each applicant must submit an application to the Secretary of the Academy on forms provided by the Academy."

6. Each applicant's "application must be endorsed by two (2) Active Fellows, or by one (1) Active Fellow and one (1) Emeritus Fellow."

7. Active Fellows must be approved "by two-thirds vote of the Board of Directors."

8. Active Fellowship "is contingent upon continuing compliance with the Articles of Incorporation and the By-Laws of the Incorporation."

9. "No person shall be elected or remain a Fellow of the Academy unless he is of good moral character and adheres to the PRINCIPLES OF MEDICAL ETHICS of the American Medical Association."

A copy of the pertinent By-Laws appears in Exhibit A. Plaintiff meets each and every one of these conditions precedent, except election by two-thirds of the Board of Directors:

1. Plaintiff is certified by the American Board of Orthopaedic Surgery and his medical practice is devoted exclusively to Orthopaedic Surgery.

2. Plaintiff is a citizen of, and practices in, the United States.

3. Plaintiff is certified by the American Board of Orthopaedic Surgery.

4. Plaintiff has engaged in the exclusive practice of Orthopaedic Surgery for three years subsequent to the completion of his period of training.

5. Plaintiff submitted an application to the Secretary of the Academy on a form provided by the Academy.

6. Plaintiff's application was endorsed by two Active Fellows, or by one Active Fellow and one Emeritus Fellow.

7. Plaintiff is in continued compliance with the Articles and By-Laws of the Academy.

8. Plaintiff is of good moral character, adheres to the Principles of Medical Ethics of the American Medical Association, and indeed is the Chairperson of the Grievance Committee of the Chicago Medical Society and the Vice-Chairperson of the Peer Review Committee of the Chicago Medical Society.

Plaintiff should therefore have been elected to membership by the Board of Directors.

19. The procedure followed by the Academy in rejecting Plaintiff's application was fundamentally unfair so that the rejection is void as a matter of common law.

WHEREFORE Plaintiff, MICHAEL R. TREISTER, prays for the following relief from Defendant, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, a corporation:

1. A declaration that Plaintiff is entitled to be informed of any charges against him.

2. A declaration that Plaintiff is entitled to be informed of the identity of his accusers.

3. A declaration that Plaintiff is entitled to a fair hearing before an impartial adjudicator.

4. A declaration that Plaintiff is entitled to conclusions of fact fairly supported by evidence of record.

5. A declaration that Plaintiff is entitled to all other rights necessary for fair consideration of his application.

6. A declaration that, because Plaintiff's rights as enumerated in Items 1-5 of this Prayer have been denied, and because of the other matter pleaded in this Complaint, the rejection of Plaintiff's application was void.

7. Upon the declaration of right as prayed for in Items 1-6 of this Prayer, such injunctive relief as may be necessary and proper to enforce the rights as declared.

8. A judgment for costs of this action.

9. Such other relief as the Court deems just and proper.

COUNT TWO - DECLARATORY JUDGMENT

1-18. For paragraphs 1-18 of Count Two, Plaintiff re-alleges Paragraphs 1-18 of Count One.

19. Because of the relationship between the Academy, the American Medical Association, the hospitals of the State of Illinois, and the State of Illinois itself, rejection of Plaintiff's application is State action.

20. The procedure followed by the Academy in rejecting Plaintiff's application deprived Plaintiff of his liberty or property without due process of law, in violation of the 14th Amendment of the United States Constitution and of Section 2 of Article I of the Constitution of the State of Illinois.

21. This action is properly before the Law Division because the amount in controversy is greater than $15,000.00.

WHEREFORE Plaintiff, MICHAEL R. TREISTER, prays for the following relief from Defendant, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, a corporation:

1. A declaration that Plaintiff is entitled to be informed of any charges against him.

2. A declaration that Plaintiff is entitled to be informed of the identity of his accusers.

3. A declaration that Plaintiff is entitled to a fair hearing before an impartial adjudicator.

4. A declaration that Plaintiff is entitled to conclusions of fact fairly supported by evidence of record.

5. A declaration that Plaintiff is entitled to all other rights necessary for fair consideration of his application.

6. A declaration that, because Plaintiff's rights as enumerated in Items 1-5 of this Prayer have been denied, and because of the other matter pleaded in this Complaint, the rejection of Plaintiff's application was void.

7. Upon the declarations of right as prayed for in Items 1-6 of this Prayer, such injunctive relief as may be necessary and proper to enforce the rights as declared.

8. A judgment for costs of this action.

9. Such other relief as the Court deems just and proper.

COUNT THREE - DECLARATORY RELIEF AND DAMAGES

1-2. For paragraphs 1 and 2 of Count 3, Plaintiff re-alleges Paragraphs 1 and 2 of Count 1.

3. Prior to June 1, 1979, the Academy promulgated instructions for filing applications for candidates for active fellowship in the Academy. A copy of said instructions are attached hereto as Exhibit B and incorporated herein by reference.

4. After receiving the instructions for filing applications for candidates for active fellowship, Plaintiff completed such an application.

5. Plaintiff has fully complied with all conditions precedent due on his part and has promised and agreed to pay all initiation fees or annual dues required.

6. The Academy received and accepted the Plaintiff's application and proceeded to act upon it.

7. The by-laws in pertinent part provided:

ARTICLE VIII: CONFIDENTIALITY

SECTION 1. Confidentiality of Application.

The entire contents of any application for Fellowship or Membership in the Academy, of whatever classification, shall be privileged and confidential and shall not be subject to publication nor public dissemination whether voluntary, involuntary or by operation of law. Said application shall be forwarded only to the appropriate Admissions Committee for consideration. Any investigation, inquiries made by, or responses received by an Admissions Committee shall likewise be privileged and confidential and shall not be subject to publication or public dissemination whether voluntary, involuntary or by operation of law.

8. The application form in pertinent part provided:

Compliance [sic] with By-Laws and Agreement of Confidentiality regarding Application.

The undersigned agrees that he will comply with each and every provision of the By-Laws of the American Academy of Orthopaedic Surgeons and any duly adopted rules and regulations pursuant thereto; and that he will comply with the Principles of Medical Ethics of the American Medical Association. It is further specifically agreed by the undersigned, that in consideration of the Academy's treatment of the entire contents of this application, as well as all inquiries or investigations made pursuant thereto as privileged and confidential material, and not subject to publication or public dissemination whether voluntary, involuntary or by operation of law, that the undersigned specifically authorizes the Academy to make whatever inquiries and investigation it deems necessary to verify the credentials, professional standing and moral or ethical character of the undersigned. The undersigned further agrees that he will not cause or attempt to cause any public disclosure of the contents of any application of any applicant for Fellowship or Membership in the Academy, of whatever classification, or any proceedings of any Admissions Committee pursuant thereto, whether said public disclosure be by operation of law or otherwise.

To preserve the confidentiality of the admission proceedings, it is specifically agreed by and between

> the applicant and the Academy that the contents of an applicant's admission file, except the application form and a copy of any correspondence to the applicant indication final action, will be destroyed by the Academy 12 months after the date of mailing such notification to the applicant of the final action taken.

9. In breach of the foregoing agreement between Plaintiff and the Academy, the Academy disclosed part of the contents of Plaintiff's application by preparing a list of applicants for Active Membership, designated as such and including the name of the Plaintiff, and distributing this list broadly to physicians throughout the United States.

10. Designation of Plaintiff as an applicant for Active Fellowship was not reasonably necessary to the solicitation of information concerning Plaintiff, was not authorized by the Plaintiff at any time, and constituted a breach of the

contractual obligation to guard the confidentiality of Plaintiff's application.

11. Broad distribution of the list of applicants to many physicians throughout the United States was not reasonably necessary to the solicitation of information concerning Plaintiff, was not authorized by Plaintiff at any time, and constituted a breach of the contractual obligation to guard the confidentiality of Plaintiff's application.

12. The designation of Plaintiff as an applicant for Active Fellowship, and the broad distribution of the list of applicants to many physicians throughout the United States, were not intended to solicit information concerning Plaintiff, but were rather intended to enhance the power of the Academy and, in conjunction with the later publication of a Roster

of Members, to enable the medical community to determine what physicians applied to, and were not admitted by, the Academy. Therefor, the designation and distribution were in violation of contractual obligation to guard the confidentiality of Plaintiff's application.

13. On October 20, 1976 the Academy, by and through its secretary F. Burke Evans, M.D., wrote Plaintiff a letter, a copy of which is attached to this complaint as Exhibit D and incorporated herein by reference, stating that Plaintiff's application had been rejected.

14. The Academy publishes a Roster of Members, which is circulated to the same physicians to whom the list of applicants for fellowship is circulated. The Academy thereby informs orthopaedic surgeons throughout the United States

of the identities of those persons whose applications for fellowship have been deferred or denied.

15. Such deferral or denial is calculated to does injure and impair the reputations and professional standings of the physicians whose applications for fellowship are deferred or denied.

16. By reason of the foregoing breach of contract, the Plaintiff has suffered and will suffer the following injuries:

a. His professional reputation and standing in the profession have been impaired;

b. He will incur additional liabilities by reason of having to disclose to malpractice insurance carriers which require such disclosure the fact that he has been rejected

as a fellow in the Academy and by reason of having to disclose such denial in connection with hospital staff application upon request of said hospitals;

c. His earning capacity within his profession will be impaired;

all to his damage in the sum of Ten Million Dollars ($10,000,000.00), all as a consequence of the foregoing breach of contract.

WHEREFORE, Plaintiff, MICHAEL R. TREISTER, prays for the following relief from the Defendants, AMERICAN ASSOCIATION OF ORTHOPAEDIC SURGEONS, a corporation:

1. A declaration that the publication of the Roster of Members excluding Plaintiff's name, or any other act revealing that Plaintiff was rejected for admission, would be a violation of the contract.

2. An injunction forbidding the publication of the Roster of Members excluding Plaintiff's name, or any other act revealing that Plaintiff was rejected for admission.

3. Judgment in the amount of Ten Million Dollars ($10,000,000.00) and the costs of this action.

4. Such other relief as the Court deems just and proper.

FOSS, SCHUMAN & DRAKE, By:

Foss, Schuman & Drake
Attorneys for Plaintiff
11 S. LaSalle St.
Chicago, IL 60603
782-2610

Exhibit A

ELIGIBILITY, ELECTION AND FINANCIAL OBLIGATIONS

for

Active Fellows

Excerpts from By-Laws

of the

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

ARTICLE IV: CATEGORIES OF MEMBERSHIP

There shall be two (2) categories of membership in the AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, namely, Fellows and Members.

ARTICLE V: FELLOWSHIP

Section 2. Active Fellowship

Active Fellowship shall be limited to those individuals who are certified by the American Board of Orthopaedic Surgery and whose medical practice is devoted exclusively to orthopaedic surgery or who are actively

engaged in the teaching or research of orthopaedic surgery or related subject matter. Active Fellows must either be citizens of or in practice in the United States or Canada. Any Active Fellow who changes from the active practice of medicine, under public or private auspices, shall be eligible to remain an Active Fellow.

Section 3. Qualifications and Election Procedure for Active Fellowship

Each applicant for Active Fellowship in the ACADEMY must be certified by the American Board of Orthopaedic Surgery and must have engaged in the exclusive practice of orthopaedic surgery for a minimum period of three (3) years subsequent to the completion of his period of training.

Each applicant must submit an application to the Secretary of the ACADEMY on

terms provided by the ACADEMY and the application must be endorsed by two (2) Active Fellows, or by one (1) Active Fellow and one (1) Emeritus Fellow. The Secretary shall then forward the completed application to the Admissions Committee which shall be responsible for the selection of those applicants who are to be recommended for election as Fellows of the ACADEMY.

The Admissions Committee, upon receipt of the application, shall forward the application to the appropriate Regional Admissions Committee for investigation. The entire contents of the application, along with all proceedings before or inquiries made by an Admissions Committee, shall be privileged and confidential.

The appropriate Regional Admissions Committee shall conduct a personal interview with the applicant and shall make

all necessary investigation to verify the credentials of the applicant and determine his qualifications. It shall submit its recommendations to the Admissions Committee. The Admissions Committee shall review the list of the applicants and submit its recommendations to the Board of Directors. Election to Active Fellowship shall be by two-thirds vote of the Board of Directors. In the event of an adverse recommendation by the Admissions Committee of an adverse action by the Board of Directors, no applicant shall be entitled to question the decision.

Fellowship in the ACADEMY is a privilege, not a right, and is contingent upon continuing compliance with the Articles of Incorporation and the By-Laws of the Corporation. No person shall be elected or remain a Fellow of the ACADEMY unless

he is of good mental character and adheres to the PRINCIPLES OF MEDICAL ETHICS of the American Medical Association

ARTICLE VII: ETHICS AND DISCIPLINE

Section 1. Forms of Disciplinary Action

The Board of Directors may censure, suspend, expel, or otherwise discipline any Fellow or Member of the ACADEMY for violation of the moral or ethical standards or violation of the rules or regulations or principles of the ACADEMY.

ARTICLE VIII: CONFIDENTIALITY

Section 1. Confidentiality of Application

The entire contents of any application for Fellowship or Membership in the ACADEMY, of whatever classification, shall be privileged and confidential and shall not be subject to publication nor public dissemination whether voluntary, involuntary or by operation of law. Said application shall

be forwarded only to the appropriate Admissions Committee for consideration. Any investigation, inquiries made by, or responses received by any Admissions Committee shall likewise be privileged and confidential and shall not be subject to publication or public dissemination whether voluntary, involuntary or by operation of law.

Section 2. Agreement of Confidentiality

Every application for Fellowship or Membership in the ACADEMY of whatever classification, shall be deemed to contain an agreement by and between the applicant and the ACADEMY and separately signed by the applicant, the agreement to contain substantially the following language:

> "It is specifically agreed by the undersigned, that in consideration of the ACADEMY'S treatment of the entire contents of this application, as well as all inquiries or investigations made pursuant thereto as privileged

and confidential material, and not subject to publication or public dissemination whether voluntarily, involuntarily or by operation of law, that the undersigned specifically authorizes the ACADEMY to make whatever inquiries and investigation it deems necessary to verify the credentials, professional standing and moral or ethical character of the undersigned. The undersigned further agrees that he will not cause or attempt to cause any public disclosing of the contents of any application of any applicant for Fellowship or Membership in the ACADEMY, of whatever classification, or any procedures of any Admissions Committee pursuant thereto, whether said public disclosure be by operation of law or otherwise."

ARTICLE XVII: FEES AND DUES

Section 1. Initiation Fees

An initiation fee, the amount of which shall be determined by the Board of Directors, shall be paid by all Active Fellows and by such Members, of whatever classification, as determined by the Board of Directors.

Section 2. Annual Dues

Annual dues, in amounts to be determined by the Board of Directors, shall be paid by Active Fellows and all classifications of Members, to the Treasurer at such time as he may demand except as otherwise provided.

To preserve the confidentiality of the admission proceedings, the contents of an applicant's admission file, except the application form and correspondence relating to final action taken, will be destroyed 12 months after the date of mailing such notification from the Academy to the applicant regarding the final action taken.

INSTRUCTIONS FOR FILING APPLICATIONS

CANDIDATES FOR ACTIVE FELLOWSHIP

CLASS OF 1977

American Academy of Orthopaedic Surgeons

[1] Complete the form in triplicate. Signatures of your sponsors are not required on the form itself, but their names and addresses must be inserted in the spaces provided on page 1. Your signature on the application form is required.

[2] Send all three copies of the application directly to:

American Academy of Orthopaedic Surgeons
430 North Michigan Avenue
Chicago, Illinois 60611

[3] It is your responsibility to request that your sponsors immediately forward letters of recommendation to the

Academy. Addressed envelopes are enclosed for this purpose. Sponsors' letters must be received by June 1, 1975. No application is complete until the sponsors' letters are received in the Academy Office.

[4] At least one sponsor must be from your area of practice and not associated with you in practice. Your sponsors must be Active Fellows of the Academy, or one Active Fellow and one Emeritus Fellow.

[5] At the time you submit your application, you must have practiced a minimum of one year in the location from which you are making application. By the time you will be eligible for induction into the Academy [January, 1977], you must have engaged in the exclusive

practice of orthopaedic surgery for a minimum period of three years subsequent to the completion of your training. Fellowships following completion of residency are not considered as time in practice.

[6] a. A personal interview with one of the members of the Regional Admissions Committee in your area is required.

b. In sufficient time prior to March 1, 1976 to permit you to make the necessary arrangements, the Chairman of the Regional Admissions Committee for your Region will, by letter, assign you to a Regional Admissions Committee member for interview.

c. It is your responsibility to make

arrangements for the interview with that Regional Admissions Committee Member.

d. The interview must take place before March 1, 1976.

e. The personal interview may be waived for applicants who are overseas during the application processing period as shown on the calendar, on approval by the Admissions Committee.

[7] The deadline for receipt of completed applications [which include letters of recommendation from two sponsors] is June 1, 1975. Applications completed after that date will be kept on file and will be processed the following year as outlined on the "Application Processing Schedule" on the back of these instructions.

APPLICATION FOR ACTIVE FELLOWSHIP

American Academy of Orthopaedic Surgeons

430 North Michigan Avenue

Chicago, Illinois 60611

[Type exactly as you desire your name to be carried in Academy records.]

NAME_____

[Last Name] [First Name] [Middle Name or Initial]

Date of Birth_____Birthplace_____

Citizenship_____

Medical College_____Degree_____

Date_____

City & State/Country_____

Duplicate: Applicant must return this copy directly to the American Academy of Orthopaedic Surgeons, 430 North Michigan Avenue, Chicago, Illinois 60611.

Specify addresses to which mail is to be directed. Office ( ) Home ( ) Notify Academy Office of address changes.

OFFICE ADDRESS:

Street & Number_____

City_____State or Province_____

Zip Code Number_____

NAME & ADDRESSES OF SPONSORS:

1._____

Street & Number_____

City & State_____Zip Code_____

2._____

Street & Number_____

City & State_____Zip Code_____

Recommendations of Regional Admissions Committees and the Admissions Committee

Regional Admissions Committee #_____

Approve:_____Date_____

Defer:_____Date_____

Reject:_____Date_____

Admissions Committee _____

Approve: _____ Date _____

Defer: _____ Date _____

Reject: _____ Date _____

1. Date of Certification by the American Board of Orthopaedic Surgery_____

2. How long have you practiced orthopaedic surgery in your present location?_____

3. Do you limit your practice exclusively to Orthopaedic Surgery?_____

Since: [Month & Year]_____

	Month & Year	Month & Year
4. Internship:		
_____	_____	_____
_____	_____	_____
5. Residency: [General, Surgical or Medical]		
_____	_____	_____
_____	_____	_____

	Month & Year	Month & Year
_____	_____	_____
_____	_____	_____
6. Resident Training in Orthopaedic Surgery		
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
7. Other Post-Graduate Study, including Fellowships		
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Hospital Affiliations:

_____

_____

_____

_____

_____

9. Teaching Affiliations:

_____

_____

_____

10. Licensed to practice in the following states: [give dates]

_____

_____

_____

_____

_____

11. Places of practice and years of location in each:

Address	From	To
_____	____	____
_____	____	____
_____	____	____
_____	____	____
_____	____	____

12. Military Service:

	From	To
General Medical____	____	____
_____	____	____
Orthopaedic_____	____	____
_____	____	____

Are you a career Officer? Yes____No____

Do you anticipate returning to civilian practice? Yes____No____Date____

Address if known:

Street & Number_____

City & State_____Zip Code_____

13. Additional Data:

a] Medical Society Memberships: [List any office or committee appointment you hold or have held.]

_____

_____

_____

_____

_____

b] Academic degrees other than M.D. and Special Honors:

c] Contributions to Medical Literature: [Append sheet if additional space is required.]

d] Other Scientific Contributions:

14. Compliance with By-Laws and Agreement of Confidentiality regarding Application

The undersigned agrees that he will comply with each and every provision of the By-Laws of the American Academy of Orthopaedic Surgeons and any duly adopted rules and regulations pursuant thereto; and that he will comply with the Principles of Medical Ethics of the American Medical Association. It is further specifically agreed by the undersigned, that in consideration of the Academy's treatment of the entire contents of this application, as well as all inquiries or investigations made pursuant thereto as privileged

and confidential material, and not subject to publication or public dissemination whether voluntarily, involuntarily or by operation of law, that the undersigned specifically authorizes the Academy to make whatever inquiries and investigation it deems necessary to verify the credentials, professional standing and moral or ethical character of the undersigned. The undersigned further agrees that he will not cause or attempt to cause any public disclosure of the contents of any application of any applicant for Fellowship or Membership in the Academy, of whatever classification, or any proceedings of any Admissions Committee pursuant thereto, whether said public disclosure be by operation of law or otherwise.

To preserve the confidentiality of the admission proceedings, it is specifically agreed by and between the applicant and the Academy that the contents of an applicant's admission file, except the application form and a copy of any correspondence to the applicant indicating final action, will be destroyed by the Academy 12 months after the date of mailing such notification to the applicant of the final action taken.

Signature_____Date_____

Date application forwarded to applicant:_____

Exhibit D

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

430 North Michigan Avenue

Chicago, Illinois 60611

(312) 822-0970

October 20, 1976

Michael R. Treister, M.D.

1200 N. Ashland Avenue

Chicago, IL 60622

Dear Doctor Treister:

Your application for Fellowship in the American Academy of Orthopaedic Surgeons has been rejected by action of the Board of Directors and the file has been closed.

Under the membership policies of the Academy, you may reapply for Fellowship

in three years by submitting an entirely new application.

Sincerely yours,

E. Burke Evans, M.D.
Secretary

EBE:pw

Exhibit B

STATE OF ILLINOIS)
) SS
COUNTY OF COOK

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

R. ANTHONY MARRESE, M.D., Plaintiff,	)	
vs.	)	NO. 78L 16328
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, Defendant.	)	

COMPLAINT AT LAW FOR DECLARATORY JUDGMENT

R. ANTHONY MARRESE, M.D., Plaintiff, by his attorneys, LANDESMAN, SCHWARTZ & AUSLANDER, hereby complains of AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, Defendant, as follows:

1. Plaintiff R. ANTHONY MARRESE, M.S., M.D., is an orthopaedic surgeon duly licensed to practice medicine in the State

of Indiana and is practicing orthopaedic surgery in the State of Indiana. Plaintiff is now and has since 1974 a diplomate of the American Board of Orthopaedic Surgery, and is the holder of various hospital appointments and teaching positions relative to his profession as an orthopaedic surgeon among them, the following:

Member: Peer Review Committee, Vanderburgh County Medical Society
Member: Medical Audit Committee, Deaconness Hospital
Member: American Society of Anesthesia
Member: Indiana Orthopaedic Society
Member: Civil Avication Medical Association

and a member of the attending staff of the following Indiana Hospitals:

Deaconness Hospital, Evansville
St. Mary's Hospital, Evansville
Welborn Baptist Hospital, Evansville
Warrick Hospital, Booneville

2. The Defendant, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS (hereinafter, "the Academy"), is a not-for-profit corporation

with its principal office at 430 North Michigan Avenue, Chicago, Illinois. The Academy admits Board certified orthopaedic surgeons to fellowship and membership in the Academy on the basis of standards and rules adopted by the Academy and published in their by-laws. A copy of said rules and by-laws as they pertain to Plaintiff's applications for fellowship are attached hereto as Exhibit A and incorporated herein by reference.

3. Active Fellowship in the Academy is a factor relied upon by hospitals in the granting of orthopaedic surgical privileges, by insurance companies in the setting of malpractice rates, by courts in determining the expertise of an orthopaedic surgeon whose testimony is offered as an expert witness and by competent, young physicians choosing a clinic in which to practice.

4. Active Fellowship in the Academy is a practice necessity for an orthopaedic

surgeon who wishes to realize maximum potential achievement and recognition in his specialty.

5. On or about May, 1975, Plaintiff applied for membership in the Academy by submitting an application form. A copy of a blank application form is attached to this Complaint as Exhibit B and incorporated herein by reference.

6. On information and belief, the Academy upon receipt of applications such as that of Plaintiff, prepares a list of applicants for Active Fellowship, designated as such; that this list, included Plaintiff at times his application was considered, and was broadly distributed to Defendant's members throughout the United States accompanied by a request for information concerning the reputation and qualifications of the persons named therein, including Plaintiff, in form substantially similar to

Exhibit C, attached hereto and incorporated by reference.

7. That sometime in 1976, the Plaintiff pursuant to his application for membership was interviewed by a member of the Regional Admissions Committee. He was not intervieweed by the Regional Admissions Committee as a whole as required by Article V, Sec. 2 of the By-Laws of the Academy.

8. That thereupon, sometime after March 31, 1976 and prior to October 12, 1976, based upon, in whole or in part, Plaintiff's 1975 application, the interview, and the responses to Exhibit C, the Admissions Committee of Defendant's organization reviewed the application, the interview and the comments contained therein and made a recommendation to the Board of Directors as to Plaintiff's application.

9. That on or about October 12, 1976 the Plaintiff was notified that the Board of Directors of Defendant organization had

deferred his application for membership for one year.

10. That the Plaintiff thereupon requested that the Defendant grant to him a review or appeal procedure so that the contents of his admissions file be disclosed to him so that he might be afforded the opportunity to rebut any adverse or incorrect information therein contained relevant to his qualifications for admission.

11. That on December 17, 1976, the Defendant denied to the Plaintiff his request for a review or appeal from its defermant decision of October, 1976, by reason of Exhibit D, attached hereto and incorporated herein by reference.

12. That sometime in January of 1977, the Plaintiff alleges on information and belief that the Defendant sent to its fellows a letter similar to Exhibit C, soliciting comments and information regarding Plaintiff with respect to his

deferred candidacy for admission to Defendant organization; and the Plaintiff verily believes that the Academy received responses thereto which are being held in his admissions file.

13. That the Plaintiff in 1977, was interviewed with respect to his renewed candidacy for admission to Defendant organization, by a member of Defendant's Regional Admissions Committee. He was not interviewed by the Regional Admissions Committee as a whole as required by Article V, Sec. 2 of the By-Laws of said Academy. On information and belief, Plaintiff alleges that the interviewer's comments were placed in his admissions file and were relied upon in consideration of his renewed membership application.

14. That the Defendant, thereupon, upon receipt of the report of interview and responses to Exhibit C, reviewed the

application and made a recommendation to the Board of Directors. That the Plaintiff was at not time informed of any responses to Exhibit C, or of the existence of substance of any other information or contents in his admissions file; that he has no knowledge of whether any information contained in his file is false, misleading, adverse or favorable; that he has in 1977, on several occasions requested the opportunity to review his file and to meet, at an appropriate hearing, with counsel, any false, misleading or adverse allegations or information against him which may have affected to action of the Regional Admissions Committee and/or the ultimate action of the Board of Directors of Defendant organization.

15. In October of 1977, the Plaintiff was informed that the Defendant had rejected his application for Admission as per Exhibit E, and that he was ineligible to reapply for admission for three years.

16. That thereafter, on December 2, 1977, by reason of Exhibit F, he once again requested that any adverse information contained in his admission file, relied upon by Defendant in rejecting his candidacy, be disclosed to him, in summary for at the least, and that he be granted the opportunity to rebut same in writing or in person, and that his application be thereafter reconsidered, or in the alternative, the three year requirement for re-application be waived.

17. That the Defendant thereafter refused to disclose the contents of Plaintiff's file and afford Plaintiff an opportunity to rebut same, and refused to reconsider his application and refused to waive the three year re-application rule.

18. That Plaintiff alleges on information and belief that the contents of his admissions file may be destroyed on or before December of 1978 so that if

this Court rules in his favor that he is entitled to a fair hearing with regard to his consideration for admission, he will be greatly damaged and prejudiced by the absence of the contents of his admissions file in that he will not be able to meet any statements therein contained which were considered against him in rejecting his application; that accordingly, Plaintiff will be irreparably injured unless the Defendant is ordered to preserve the Plaintiff's admission file and all of the contents therein until determination of his rights hereunder; that such order will not cause hardship to the Defendants.

19. The procedure followed by the Academy in deferring and ultimately rejecting Plaintiff's application is a violation of its o a by-laws, which require it to abide by the Principals of Medical Ethics of the American Medical Association, as follows:

> The basic principles of a fair and objective hearing should always be accorded to the physician whose professional conduct is being reviewed. These basic guarantees are: a specific charge, adequate notice of hearing, the opportunity to be present and to hear the evidence, and to present a defense...
>
> These principles of fair play apply in all disciplinary hearings and in any other type of hearing in which the physician may be deprived of valuable rights. Whenever physicians sit in judgment /sic/ on physicians and whenever that judgment affects a physician's reputation, professional status or livelihood, these principles of fair play must be observed... (emphasis supplied)
>
> (Article 5, Sec. 4, Opinions and Reports of the Judicial Council, Including the Principles of Medical Ethics and Rules of the Judicial Council, Medical Ethics Dept. AMA, 1971).

in that it is a situation where the Plaintiff could be deprived of valuable rights as otherwise set forth herein and a situation where physicians sit in judgment of other physicians.

20. That the Plaintiff meets all of the requirements for admission to the Academy as set forth in the By-Laws contained in Exhibit A, except election by two-thirds of the Board of Directors.

21. The procedure followed by the Academy in deferring and later rejecting Plaintiff's application, and the imposition of the rule that Plaintiff may not re-apply for membership for three years without granting Plaintiff a hearing is fundamentally unfair in that by such action, Defendant has deprived Plaintiff of the opportunity to maximize his professional potential by reason of the power of Defendant to affect same as hereinbefore alleged.

22. That because of the relationship between the Defendant, the American Medical Association, and the State of Illinois in chartering said Defendant and affording it legitimacy and power, rejection of

Plaintiff's application is State action.

23. The procedure followed by Defendant in deferring and later rejecting Plaintiff's application is a deprivation of Plaintiff's liberty or property without due process of law in violation of the 14th Amendment of the United States Constitution and of Section 2 of Article 1 of the Constitution of the State of Illinois.

WHEREFORE, Plaintiff, R. ANTHONY MARRESE, M.D., prays for the following relief from the Defendant, AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, a corporation:

A. A declaration that the Plaintiff is entitled to be informed of any charges against him which are or were contained in his admissions file which were considered in Defendant's ultimate decision to reject his application for membership in the Academy.

B. A declaration that the Plaintiff is entitled to be informed of the identity of any persons making statements concerning him

which were considered by the Defendant in rejecting his application.

C. A declaration that the Plaintiff is entitled to a fair hearing before an impartial adjudicator in that he will be able to meet any charges concerning him which were false or misleading, and be represented by counsel at a re-consideration of his membership application.

D. A declaration that Plaintiff is entitled to conclusions of fact fairly supported by evidence of record.

E. A declaration that Plaintiff is entitled to all other rights necessary for a fair consideration of his application.

F. That the Court order that the Defendant preserve Plaintiff's admission file and all of the contents therein until adjudication of the merits of this Complaint and for such time as may be necessary and property for preservation of Plaintiff's rights as declared.

G. A declaration that Plaintiff's rejection as presently constituted was void and must be acted upon anew after a fair hearing; a declaration that Defendant's rule that Plaintiff may not re-apply for three years is void inasmuch as same is based upon improper consideration of application the first place.

H. For such other and further relief as may be just in the premises.

R. ANTHONY MARRESE, M.D.

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

R. ANTHONY MARRESE, M.D., being first duly sworn on oath, deposes and says that he has read the foregoing Complaint at Law by him subscribed, that he knows the contents thereof, and that the same are true and correct in substance and in fact.

R. ANTHONY MARRESE, M.D.

SUBSCRIBED AND SWOKN to before me this _____ day of _____, 1978.

NOTARY PUBLIC

LANDESMAN, SCHWARTZ & AUSLANDER
ATTORNEYS FOR PLAINTIFF
10 SOUTH LA SALLE STREET
CHICAGO, ILLINOIS 60603
346-6650

Exhibit A

ELIGIBLITY, ELECTION AND FINANCIAL OBLIGATIONS

FOR

Active Fellows

Excerpts from By-Laws

of the

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

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There shall be two (2) categories of membership in the AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS, namely, Fellows and Members.

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Section 2. Active Fellowship

Active Fellowship shall be limited to those individuals who are certified by the American Board of Orthopaedic Surgery and whose medical practice is devoted exclusively to orthopaedic surgery or who are actively engaged in the teaching or research of orthopaedic surgery or related subject matter. Active Fellows must either be citizens of or

in practice in the United States or Canada. Any Active Fellow who changes from the active practice of medicine, under public or private auspices, shall be eligible to remain an Active Fellow ....

Section 3. Qualifications and Election Procedure for Active Fellowship

Each applicant for Active Fellowship in the ACADEMY must be certified by the American Board of Orthopaedic Surgery and must have engaged in the exclusive practice of orthopaedic surgery for a minimum period of three (3) Years subsequent to the completion of his period of training.

Each applicant must submit an application to the Secretary of the ACADEMY on forms provided by the ACADEMY and the application must be endorsed by two (2) Active Fellows, or by one (1) Active Fellow and one (1) Emeritus Fellow. The Secretary

shall then forward the completed application to the Admissions Committee which shall be responsible for the selection of those applicants who are to be recommended for election as Fellows of the ACADEMY.

The Admissions Committee, upon receipt of the application, shall forward the application to the appropriate Regional Admissions Committee for investigation. The entire contents of the application, along with all proceedings before or inquiries made by an Admissions Committee, shall be privileged and confidential.

The appropriate Regional Admissions Committee shall conduct a personal interview with the applicant and shall make the necessary investigation to verify the credentials of the applicant and determine his qualifications. It shall submit its recommendations to the Admissions Committee.

The Admissions Committee shall review the list of the applicants and submit its recommendations to the Board of Directors. Election to Active Fellowship shall be by two-thirds vote of the Board of Directors. In the event of an adverse recommendation by the Admissions Committee or an adverse action by the Board of Directors, no applicant shall be entitled to question the decision.

Fellowship in the ACADEMY is a privilege, not a right, and is contingent upon continuing compliance with the Articles of Incorporation and the By-Laws of the Corporation. No person shall be elected or remain a Fellow of the ACADEMY unless he is of good moral character and adheres to the PRINCIPLES OF MEDICAL ETHICS of the American Medical Association.

Eligibility, Election and Financial Obligations

ARTICLE VII: ETHICS AND DISCIPLINE

Section 1. Forms of Disciplinary Action

The Board of Directors may censure, suspend, expel, or otherwise discipline any Fellow or Member of the ACADEMY for violation of the moral or ethical standards or violation of the rules or regulations or principles of the ACADEMY.

ARTICLE VIII: CONFIDENTIALITY

Section 1. Confidentiality of Application

The entire contents of any application for Fellowship or Membership in the ACADEMY, of whatever classification, shall be privileged and confidential and shall not be subject to publication nor public dissemination whether voluntary, involuntary or by operation of law. Said application shall be forwarded only to the appropriate Admissions Committee for consideration. Any investigation, inquiries made by, or responses received by any Admissions Committee shall likewise be

privileged and confidential and shall not be subject to publication or public dissemination whether voluntary, involuntary or by operation of law.

Section 2. Agreement of Confidentiality

Every application for Fellowship or Membership in the ACADEMY of whatever classification, shall be deemed to contain an agreement by and between the applicant and the ACADEMY and separately signed by the applicant, the agreement to contain substantially the following language:

> "It is specifically agreed by the undersigned, that in consideration of the ACADEMY'S treatment of the entire contents of this application, as well as all inquiries or investigations made pursuant thereto as privileged and confidential material, and not subject to publication or public dissemination whether voluntarily, involuntarily or by operation of law, that the undersigned specifically authorizes the ACADEMY to make whatever inquiries and investigation it deems necessary to verify the credentials, professional standing and moral or ethical

character of the undersigned. The undersigned further agrees that he will not cause or attempt to cause any public disclosure of the contents of any application of any applicant for Fellowship or Membership in the ACADEMY, of whatever classification or any proceedings of any Admissions Committee pursuant thereto, whether said public disclosure be by operation of law or otherwise."

ARTICLE XVII: FEES AND DUES

Section 1. Initiation Fees

An initiation fee, the amount of which shall be determined by the Board of Directors shall be paid by all Active Fellows and by such Members, of whatever classificatio as determined by the Board of Directors.

Section 2. Annual Dues

Annual dues, in amounts to be determined by the Board of Directors, shall be paid by Active Fellows and all classifications of Members, to the Treasurer at such time as he may demand except as otherwise provided.

To preserve the confidentiality of the admission proceedings, the contents of an applicant's admission file, except the application form and correspondence relating to final action taken, will be destroyed 12 months after the date of mailing such notification from the Academy to the applicant regarding the final action taken.

Exhibit B

APPLICATION FOR ACTIVE FELLOWSHIP

American Academy of Orthopaedic Surgeons

430 North Michigan Avenue

Chicago, Illinois 60611

[Type exactly as you desire your name to be carried in Academy records.]

NAME_____

[Last Name] [First Name] [Middle Name or Initial]

Date of Birth_____Birthplace_____

Citizenship_____

Medical College_____Degree_____

Date_____

City & State/Country_____

Duplicate: Applicant must return this copy directly to the American Academy of Orthopaedic Surgeons, 430 North Michigan Avenue, Chicago, Illinois 60611.

Specify addresses to which mail is to be directed. Office ( ) Home ( ) Notify Academy Office of address changes.

OFFICE ADDRESS:

Street & Number_____

City_____State or Provence_____

Zip Code Number_____

NAME & ADDRESSES OF SPONSORS:

1._____

Street & Number_____

City & State_____Zip Code_____

2._____

Street & Number_____

City & State_____Zip Code_____

Recommendations of Regional Admissions Committees and the Admissions Committee

Regional Admissions Committee #_____

Approve:_____Date_____

Defer:_____Date_____

Reject:_____Date_____

Admissions Committee _____

Approve: _____ Date _____

Defer: _____ Date _____

Reject: _____ Date _____

1. Date of Certification by the American Board of Orthopaedic Surgery _____

2. How long have you practiced orthopaedic surgery in your present location? _____

3. Do you limit your practice exclusively to Orthopaedic Surgery? _____

Since: [Month & Year] _____

	Month & Year	Month & Year
4. Internship:		
_____	_____	_____
_____	_____	_____
5. Residency; [General, Surgical or Medical]		
_____	_____	_____
_____	_____	_____

	Month & Year	Month & Year
_____	_____	_____
_____	_____	_____
6. Resident Training in Orthopaedic Surgery		
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
7. Other Post-Graduate Study, including Fellowships		
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Hospital Affiliations:

_____

_____

_____

_____

_____

9. Teaching Affiliations:

_____

_____

_____

10. Licensed to practice in the following states: [give dates]

_____

_____

_____

_____

_____

11. Places of practice and years of location in each:

Address	From	To
_____	____	____
_____	____	____
_____	____	____
_____	____	____
_____	____	____

12. Military Service:

	From	To
General Medical_____	____	____
_____	____	____
Orthopaedic_____	____	____
_____	____	____

Are you a career Officer? Yes____No____

Do you anticipate returning to civilian practice? Yes____No____Date____

Address if known:

Street & Number_____

City & State_____Zip Code_____

13. Additional Data:

a[Medical Society Memberships: [List any office or committee appointment you hold or have held.]

_____

_____

_____

_____

_____

b] Academic degrees other than M.D. and Special Honors:

c] Contributions to Medical Literature: [Append sheet if additional space is required.]

d] Other Scientific Contributions:

14. Compliance with By-Laws and Agreement of Confidentiality regarding Application

The undersigned agrees that he will comply with each and every provision of the By-Laws of the American Academy of Orthopaedic Surgeons and any duly adopted rules and regulations pursuant thereto; and that he will comply with the Principles of Medical Ethics of the American Medical Association. It is further specifically agreed by the undersigned, that in consideration of the Academy's treatment of the entire contents of this application, as well as all inquiries or investigations made pursuant thereto as privileged

and confidential material, and not subject to publication or public dissemination whether voluntarily, involuntarily or by operation of law, that the undersigned specifically authorizes the Academy to make whatever inquiries and investigation it deems necessary to verify the credentials, professional standing and moral or ethical character of the undersigned. The undersigned further agrees that he will not cause or attempt to cause any public disclosure of the contents of any application of any applicant for Fellowship or Membership in the Academy, of whatever classification, or any proceedings of any Admissions Committee pursuant thereto, whether said public disclosure be by operation of law or otherwise.

To preserve the confidentiality of the admission proceedings, it is specifically agreed by and between the applicant and the Academy that the contents of an applicant's admission file, except the application form and a copy of any correspondence to the applicant indicating final action, will be destroyed by the Academy 12 months after the date of mailing such notification to the applicant of the final action taken.

Signature_____Date_____

Date application forwarded to applicant:_____

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS
430 N. Michigan Avenue, Chicago, Illinois
(312) 822-0970

January 1977

Dear Academy Fellow:

There is insufficient information accompanying applications of candidates listed on the attached form for Fellowship in the Academy Class of 1978. In order to properly evaluate these candidates, the Admissions Committee is seeking all available information regarding them. Frank opinions of candidates known to you will aid the Admissions Committee in making englightened decisions. The Academy will use all efforts to protect and preserve the confidentiality of your remarks and will resist any attempts to cause disclosure of such information.

A supply of forms is enclosed for your convenience in transmitting information concerning these candidates to the

Admissions Committee. Please complete a SEPARATE form for each candidate with whom you are acquainted, and promptly return the completed forms to the Academy Office in the enclosed self addressed envelope. Please be certain that you have clearly printed the applicant's name and address on the form and that you have indicated your own name and address.

No reply is necessary if you are not acquainted with any of the applicants.

To be of value to the Admissions Committee your reply must be received prior to March 31, 1977.

Sincerely,

G. Dean MacEwen, M.D.
Chairman, Admissions Committee

GDM:pw

Exhibit D

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

430 North Michigan Avenue, Chicago, Illinois

(312) 822-0970

December 16, 1976

R. Anthony Marresi, M.D.

St. Mary's Medical Building

801 St. Mary's Drive

Evansville, Indiana 47715

Dear Doctor Marresi:

Your letter to Dr. R. Kirklin Ashley, former Chairman of the Admissions Committee has been referred to the Academy office for response.

The By-Laws of the Academy (excerpts of which you received along with your initial application) provide that: "The entire contents of any application for Fellowship or Membership in the Academy, of whatever classification, shall be privileged and confidential and shall not be subject to

publication nor public dissemination whether voluntary, involuntary or by operation of law. Said application shall be forwarded only to the appropriate Admissions Committee for consideration. Any investigation, inquiries made by, or responses received by any Admissions Committee shall likewise be privileged and confidential and shall not be subject to publication or public dissemination whether voluntary, involuntary or by operation of law." The Academy By-Laws further provide that: "In the event of an adverse recommendation by the Admissions Committee or an adverse action by the Board of Directors no applicant shall be entitled to question the decision.

We also wish to call your attention to the application form which you submitted. By your signature thereupon, you have agreed to respect and preserve the confidentiality of all proceedings or

deliberations pertaining to the processing of your application.

In accordance with the above By Law provisions, your request for review or appeal of your application cannot be granted. As you know, your current status is one of "deferment" pending further consideration. This means that no decision as to your eligibility has been made to date.

We thank you for your interest in the Academy.

Sincerely,

Charles V. Heck, M.D.

CVH:pw

Exhibit E

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

430 North Michigan Avenue, Chicago, Illinois

(312) 882-0970

October 12, 1977

R. Anthony Marrese, M.D.

801 St. Mary's Drive

Evansville, Indiana 47715

Dear Doctor Marrese:

Your application for Fellowship in the American Academy of Orthopaedic Surgeons has been rejected by action of the Board of Directors and the file has been closed. Under the membership policies of the Academy you may reapply for Fellowship in three years by submitting an entirely new application.

Sincerely,

E. Burke Evans, M.D.

Secretary

EBE:pw

Exhibit F

BONE AND JOINT SURGEONS, INC.

ST. MARY MEDICAL BUILDING - 601 ST. MARY'S DRIVE

EVANSVILLE, INDIANA 47715

TEL. (612) 479 -0000

December 2, 1977

American Academy of Orthopaedic Surgeons

430 North Michigan Avenue

Chicago, Illinois

Dear Dr. E. Burke Evans:

I am in receipt of your letter of October 12, 1977, informing me that my application has been rejected and that I may not re-apply for three years under your by-laws.

Since I do meet all of the threshold requirements of admission, I can only presume that there is adverse information in my file which prevented me from being elected to membership. The very fact of non-admission is damaging to me in maximizing my economic livelihoold and my reputation, because that rejection must be disclosed on

hospital staff applications and insurance applications, and the fact that due to your publication procedures, it will be widely known through the orthopaedic profession that I was not accepted for membership and this will affect my ability to obtain associates, since the great majority of board certified practitioners are fellows of your organization. While I am not asking at this time that the source of any adverse information be revealed to me, I do believe that I may be entitled to a summary of the nature of the adverse information, so that I may have the opportunity to present additional information to the Society in rebuttal thereof. I do not know whether the adverse information is true, false, fanciful or subjective, nor do I have any idea as to your standards or what adverse information is considered to be the basis of rejection for membership.

Additionally, I was not aware that your membership policies include a rule that a rejected applicant may not reapply for three years. Being unaware of your membership policies and your reasons for rejecting me, leaves me in the untenable position of being unable to remedy this situation for at least three years, and perhaps forever, a situation which affects my livelihood and my reputation.

I am therefore asking at this time that you inform me of your criteria for membership once the threshold requirements have been met, that you inform me in at least a general way of the nature of any adverse information in my file which affects my election to membership, afford me the opportunity to rebut same either in writing or in person, and reconsider my application after such procedure has been complied with. If this is not possible, please advise whether it is

to waive the three year requirements which is not contained in your By-Laws so that I may apply once again for membership early in 1978.

Sincerely,

R. Anthony Marrese, M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

R. ANTHONY MARRESE, M.D., and MICHAEL R. TREISTER, M.D.,	)	
Plaintiffs,	)	
vs.	)	NO. 80 C 1405
	)	Trial by Jury
AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,	)	Demanded
Defendant.	)	

ANSWER

The American Academy of Orthopaedic Suregons (hereinafter "Academy"), by its attorneys, responds to the Amended Complaint filed by Doctors Marrese and Treister as follows:

COUNT I

"1. Jurisdiction of this Action is conferred upon this Court by 28 U.S.C. §1337. This Action arises under Sections 4 and 16 of the Clayton Act of 1914, 15 U.S.C. §§15, 26, as hereinafter more fully appears. The Plaintiffs seek to recover treble the amount of damages caused by Defendant's violations of Section 1 of the Sherman Act, 15 U.S.C. §1, and prevent

and restrain such violations."

Response: The Academy denies each allegation in Paragraph 1 except to acknowledge the plaintiffs' reliance on 28 U.S.C. §1337. AAOS expressly denies that any facts exist which give rise to an antitrust claim of which this Court might have jurisdiction.

"2. The Defendant, American Academy of Orthopaedic Surgeons (herinafter the "Academy"), is a not-for-profit corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business at 444 North Michigan Avenue, Chicago, Illinois, in this District and Division."

Response: The Academy acknowledges that its principal office and place of business is located at 444 North Michigan, Chicago, Illinois, and that it is a not-for-profit corporation organized under the laws of the State of Illinois.

"3. The Academy is engaged in interstate commerce in, among other things, the providing of nationwide informational,

educational and other associational services to its members, who comprise the great majority of those physicians throughout the United States who are certified by the American Board of Orthopaedic Surgery and who have engaged in the exclusive practice of orthopaedic surgery for a minimum period of three years following the completion of their formal training. Its membership includes residents of all fifty states and Canada."

Response: The Academy denies each and every allegation in Paragraph 3 except to acknowledge that the Academy provides educational and associational services to physicians interested in the subject of orthopaedic surgery. The Academy also acknowledges that it has members residing in each of the 50 states and Canada, most of whom are physicians who have been board certified in orthopaedic surgery and limit their practice to that specialty.

"4. Most or all of the Academy's active United States members derive a substantial portion of their income, directly or indirectly, from the surgical fees charged to patients insured under the federal programs commonly known as Medicare

and Medicaid. The total fees charged, directly or indirectly, by said members for said services greatly exceed the sum of FIVE HUNDRED MILLION DOLLARS ($500,000,000) per year."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations contained in Paragraph 4.

"5. The total fees charged directly or indirectly by Plaintiffs, who have been denied admission to the Academy, with respect to their own patients who are insured under the above federal programs, exceed the sum of TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000) per year."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations stated in Paragraph 5.

"6. Applications for fellowship in the Academy are received and processed on a nationwide basis, with the names of all applicants included on lists that are distributed by Defendant to its members throughout the United States accompanied by a request for information pertaining to the reputation and qualifications of the persons so listed. Said information is then considered by the Regional Admis-

sions Committees and the Board of Directors of the Academy, which committees and board are themselves drawn from the nationwide membership, in deciding whether to grant or deny the membership applications. All such decisions supposedly conform to the By-Laws of the Academy, which apply throughout the United States."

Response: The Academy denies each and every allegation in paragraph 6 except to acknowledge as follows:

(a) The Academy receives applications for fellowship from physicians living or practicing in various parts of the country.

(b) The Academy requests information from its members about each applicant.

(c) An Academy member serving on the Regional Admissions Committee for the geographic area in which an applicant practices interviews each applicant.

(d) Pursuant to Academy By-Laws,

applicants are elected to fellowship by the Board of Directors of the Academy.

(e) In the instance of the applications of Dr. Marrese and Dr. Treister, no member of the Board of Directors that voted on their applications was a physician practicing in Illinois or Indiana, the states where those physicians reside.

"7. Plaintiffs, Dr. Marrese and Dr. Treister, are orthopaedic surgeons duly licensed to practice medicine and surgery and presently practicing orthopaedic surgery in the States of Indiana and Illinois, respectively. Since 1974 each has been certified and has remained certified by the American Board of Orthopaedic Surgery."

Response: Upon information, the Academy believes that Doctors Marrese and Treister are orthopaedic surgeons practicing in that specialty in the states of Indiana and Illinois, respectively. The

Academy further believes that both Doctors Marrese and Treister have been certified by the American Board of Orthopaedic Surgery. Except as stated herein, the Academy lacks sufficient information to form a belief as to the truth of the allegations contained in Paragraph 7.

"8. Defendant, Academy, is the sole generally recognized organization of its kind in the orthopaedic surgical profession and freely holds itself out to be such. It is closely affiliated with the American Medical Association, which officially recognizes the Academy as the spokesman for all orthopaedists."

Response: The Academy denies each and every allegation in Paragraph 8 except to acknowledge that it is a voluntary, professional society of board certified orthopaedic surgeons.

"9. In turn, although the American Board of Orthopaedic Surgery (ABOS) certifies orthopaedic surgeons, the Academy was largely responsible for the formation of that certifying body and continues to be intimately involved with it through, among other things, interlocking boards

of directors. All members of the board of directors of ABOS are also present or past members of the board of the Academy, and the Academy is empowered by the ABOS to nominate the candidates for the latter's board."

Response: The Academy denies each and every allegation stated in Paragraph 9 except to acknowledge as follows:

(a) The American Board of Orthopaedic Surgery is an independent corporation which administers a testing procedure by which orthopaedic surgeons may become certified in their speciality.

(b) Individual physicians who have served in leadership positions with the Academy have previously or subsequently served in leadership capacities of the American Board of Orthopaedic Surgery.

(c) The Academy is asked by the Board of Orthopaedic Surgeons

for nominees from which the American Board of Orthopaedic Surgery sometimes selects some of the physicians who serve on its board.

"10. The Academy is, in a word, a monopoly in its field, possessed of substantial power to control the market for orthopaedic surgical services, especially by denying access to any of the various subspecialty organizations of the practice."

Response: The Academy denies each and every allegation stated in Paragraph 10.

"10A. On information and belief, membership in the Academy is a requirement for membership in most of the above subspecialty organizations including, among others, the American Orthopaedic Foot Society and the American Orthopaedic Society for Sports Medicine."

Response: The Academy denies each and every allegation stated in Paragraph 10A, except to acknowledge, upon information, that it believes the American Orthopaedic Foot Society and the American Orthopaedic Society for Sports Medicine

are independent corporations, each of which require Academy fellowship for membership.

"11. Active fellowship in the Academy is a factor relied upon by hospitals in the granting of orthopaedic surgical privileges, by physicians in making referrals of patients' cases, by insurance companies in the setting of malpractice insurance premiums, by courts and other adjudicative panels in determining the expertise of orthopaedic surgeons whose testimony is offered as expert witnesses, and by aspiring orthopaedic surgeons choosing a clinic in which to practice."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations stated in Paragraph 11.

"11A. Members enjoy significant competitive advantages over nonmembers in regard to advancement, and particularly sustained, long-term advancement, in the orthopaedic surgical profession."

Response: The Academy denies each and every allegation stated in Paragraph 11A.

"12. Conversely, rejection for Academy membership, which must be dis-

closed to hospitals where staff privileges are sought, to insurance companies whose liability coverage is sought, to other professional societies to which admission is sought, and to any court or similar authority in response to questions about and expert witness's qualifications, is a subject of suspicion and disgrace."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations stated in Paragraph 12, except to state that it does not believe the failure to be elected to fellowship in the Academy is a fact which must be disclosed in the contexts described.

"13. Both Plaintiffs have been repeatedly subjected to such suspicion and disgrace as hereinafter more fully appears."

Response: The Academy denies each and every allegation stated in Paragraph 13.

"14. In November of 1974, Plaintiff Treister applied for membership in the Academy by submitting an application form. A copy of a blank application form is attached to this Complaint as Exhibit A and incorporated herein by reference."

Response: The Academy acknowledges that Dr. Treister applied for membership by submitting an application form, and has attached a blank copy of an application form as an exhibit to the Amended Complaint.

"15. On information and belief, after the above application, the Academy prepared a list of applicants for Active Fellowship, designated as such, which list included Dr. Treister. This list was broadly distributed to physicians throughout the United States, accompanied by a request for information concerning the reputation and qualifications of all the persons so named."

Response: The Academy denies each and every allegation stated in Paragraph 15, except to acknowledge that following the receipt of Dr. Treister's application, his name was included in a lengthy list of applicants which was mailed to active fellows of the Academy.

"16. In January 1976, Plaintiff Treister received a notice stating that Dr. Louis W. Kolb, a member of the cogni-

zant Regional Admissions Committee, would interview him as part of the processing of his application."

Response: Upon information, the Academy believes that Dr. Treister received notification that Dr. Louis W. Kolb, a member of Regional Admissions Committee No. 7, would interview him in connection with his application for membership in the Academy.

"17. When the above interview took place Dr. Kolb informed Dr. Treister that there was adverse information in Plaintiff's file which Dr. Kolb predicted would cause the application to be rejected."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations stated in Paragraph 17.

"18. Dr. Kolb informed Dr. Treister taht the above adverse information generally concerned his supposed 'improper' testimony in a medical malpractice case and his paid assistance, during his preiod of residency, of another orthopaedic surgeon in his private orthopaedic practice."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations stated in Paragraph 18.

"19. Dr. Treister replied to Dr. Kolb as specifically as he could, given the general nature of the above charges, stating that the charge of "improper" testimony was false and that the charge concerning his outside practice was irrelevant, in that the conduct alleged was not a violation of any ethical standard but was instead standard practice among Active Fellows of the Academy and was performed with the knowledge and consent and under the guidance of at least one such Active Fellow."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations stated in Paragraph 19.

"20. Dr. Treister asked Dr. Kolb to let him see the file. Dr. Kolb stated that Academy regulations forbade such examination, and denied this request."

Response: The Academy lacks sufficient information to form a belief as to the truth of the matters stated in Para-

graph 20.

"21. Dr. Treister asked Dr. Kolb to further specify the nature of the charges so that he could rebut them. Dr. Kolb stated that Academy regulations forbade such disclosure, and denied this request."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations stated in Paragraph 21 except to acknowledge that the By-Laws of the Academy forbid disclosure of information regarding applicants. Dr. Treister agreed to such confidentiality in submitting his application.

"22. Dr. Treister asked Dr. Kolb the identity of the persons making the charges, so that he could confront his accusers. Dr. Kolb stated that Academy regulations forbade such disclosure, and denied this request."

Response: The Academy lacks sufficient information to form a belief as to the truth of the matters stated in Paragraph 22.

"23. Dr. Treister asked Dr. Kolb to cite the regulations referred to in Paragraphs 20, 21 and 22 above. Dr. Kolb denied this request, refused to cite any authority for denying Plaintiff's requests to see his file, to be informed of the charges against him or to identify his accusers, as stated in Paragraphs 20, 21 and 22 above, and refused to cite any authority for refusing to cite such authorities, as stated in this Paragraph."

Response: The Academy lacks sufficient information to form a belief as to the truth of the matters stated in Paragraph 23.

"24. At the suggestion of Dr. Kolb, Plaintiff wrote a letter, dated February 6, 1976, and addressed to Dr. Kolb as agent for the Academy, attempting to rebut the charges as well as possible under the circumstances."

Response: The Academy denies each and every allegation stated in Paragraph 24 except to acknowledge that Dr. Treister wrote a letter dated February 6, 1976, regarding his application for fellowship in the Academy.

"25. The letter referred to in Paragraph 24 concluded with a request for all available appeal rights, and for the right to be represented by counsel, in these words:

> I urge the Committee to probe these matters in depth and I shall welcome the opportunity and seek the right to participate in any such investigations. I shall also be more than happy to employ my counsel at my expense to aid the committee in this process on an administrative level."

Response: The Academy acknowledges the accuracy of the quotation recited in Paragraph 25, but objects to the incomplete and potentially misleading recitation of a single quotation outside the context of the entire letter.

"26. Dr. Treister received no response to this letter. He received no communication from the Academy or any representative thereof concerning this application until October 1976, when he received a letter stating that his application had been rejected, that the matter was closed, and that he could not apply for admission again for three years. A copy of this letter is attached to this Complaint as Exhibit B and incorporated herein by reference."

Response: The Academy denies each and every allegation stated in Paragraph 26 except to acknowledge that in October 1976, Dr. Treister was notified by letter that his application had been rejected, that his file had been closed, and that he may reapply for admission in 3 years. A copy of that letter is attached as an exhibit to the Amended Complaint.

"27. At present and at all times since said rejection, Defendant Academy has continued to refuse disclosure of the contents of the aforesaid file or to afford Dr. Treister any opportunity to rebut the charges therein."

Response: The Academy denies each and every allegation stated in Paragraph 27 except to acknowledge that the file of Dr. Treister, like the file of all other successful or unsuccessful applicants for membership, has been maintained on a confidential basis as required by the Academy's By-Laws and in conformity with the written

agreement of the applicant.

"28. After being required to wait for three years in accordance with the Academy's By-Laws, Dr. Treister has recently reapplied for membership. This separate, second application of his is now under the Academy's consideration."

Response: The Academy denies each and every allegation stated in Paragraph 28 except to acknowledge that Dr. Treister has recently reapplied for fellowship in the Academy.

"29. On or about May 1975 Plaintiff Dr. Marrese made a similar application to that of Dr. Treister described hereinabove in Paragraph 14. On information and belief, after said application, the Academy prepared a list of applicants including Dr. Marrese similar to the list described hereinabove in Paragraph 15 and distributed it in a similar manner accompanied by a similar request for information. Early in 1976, Dr. Marrese, pursuant to this other application for membership, was interviewed by another member of a different Regional Admissions Committee."

Response: The Academy denies each and every allegation stated in Paragraph 29 except to acknowledge that:

(a) Dr. Marrese applied for Academy fellowship in approximately May 1975.

(b) Dr. Marrese's name was included among a list of applicants for membership to the Academy which was mailed to all active fellows of the Academy.

(d) Dr. Marrese was interviewed by a member of Regional Admissions Committee No. 6 in connection with his application for membership.

"30. Thereupon, sometime after March 31, 1976, and prior to October 12, 1976, based upon in whole or in part, Dr. Marrese's 1975 application, the aforesaid interview, and the responses to the aforesaid public solicitation of comments, the Admissions Committee of Defendant reviewed the application, the interview and the comments contained therein and made a recommendation to the Board of Directors as to the disposition of the application."

Response: The Academy denies each and every allegation stated in Paragraph 39 except to acknowledge that the Admissions Committee of the Academy made a recommendation to the Board of Directors of the Academy with respect to the application of Dr. Marrese.

"31. On or about October 12, 1976, Dr. Marrese was notified that the Board of Directors of Defendant has deferred his application for membership for one year."

Response: The Academy acknowledges that Dr. Marrese was notified that the Board of Directors deferred his application for membership for one year.

"32. Dr. Marrese thereupon requested that the Defendant grant to him a review or appeal procedure so that the contents of his admissions file might be disclosed to him and that he might thus be afforded the opportunity to rebut any adverse or incorrect information therein contained relevant to his qualifications for admission."

Response: The Academy denies each and every allegation stated in Paragraph

32 except to acknowledge that Dr. Marrese asked the Academy to allow a review of his admissions file.

"33. On December 17, 1976, the Defendant denied to the Plaintiff his request for a review or appeal from its deferment decision of October 1976, by reason of Exhibit C, attached hereto and incorporated herein by reference."

Response: The Academy acknowledges that it has maintained the admissions file of Dr. Marrese in confidence as provided by the Academy's By-Laws and pursuant to Dr. Marrese's written agreement, and that it responded to Dr. Marrese's request by a letter dated December 17, 1976. A copy of that letter is attached as an exhibit to the Amended Complaint.

"34. On information and belief, in January of 1977, the Defendant sent to its Fellows another letter similar to the one sent in 1975, soliciting comments and information regarding Dr. Marrese with respect to his deferred candidacy for admission to Defendant organization; and Dr. Marrese verily believes that the Academy received responses thereto which are being held in

his admissions file."

Response: The Academy denies each and every allegation stated in Paragraph 34, except to acknowledge that Dr. Marrese's name is included in a list of names of applicants, which list was sent to all active fellows of the Academy. Any responses received following the mailing of that list would have been incorporated in Dr. Marrese's admissions file.

"35. In 1977, Dr. Marrese was again interviewed, with respect to his renewed candidacy for admission to Defendant organization, by a member of Defendant's Regional Admissions Committee. On information and belief, the interviewer's comments were placed in his admissions file and were relied upon in consideration of his renewed membership application."

Response: The Academy denies each and every allegation stated in Paragraph 35 except to acknowledge that Dr. Marrese was interviewed in 1977 by a member of Regional Admissions Committee No. 6, and the interviewer's report was included in

Dr. Marrese's admissions file.

"36. Defendant thereupon, after receipt of the report of said interview and responses to the aforesaid public questionnaire, reviewed the application and made a new recommendation to the Board of Directors."

Response: The Academy denies each and every allegation stated in Paragraph 36 except to acknowledge that a recommendation was made to the Board of Directors of the Academy with respect to Dr. Marrese's application.

"37. On several occasions during 1977, Dr. Marrese specifically requested the opportunity to review his file and to meet, at an appropriate hearing, with counsel, any false, misleading or adverse allegations or information against him which might affect or have affected the action of the Regional Admissions Committee or the ultimate action of the Board of Directors of Defendant."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations stated in Paragraph 37.

"38. However, Dr. Marrese was at no time informed of any responses

to the questionnaire, or of the existence or substance of any other information or contents in his admissions file. He neither had nor has any knowledge whether any information contained in his file was or is false, misleading, adverse or favorable."

Response: The Academy acknowledges that the file of Dr. Marrese, like the file of all other successful and unsuccessful applicants, has been maintained on a confidential basis pursuant to the Academy's By-Laws and in conformity with the written agreement of each applicant. The Academy lacks sufficient information to form a belief as to the truth of the further or inconsistent allegations stated in Paragraph 38.

"39. In October of 1977, Dr. Marrese was informed that the Defendant had rejected his application for Admission as per Exhibit D and that he was ineligible to reapply for admission for three years."

Response: The Academy acknowledges that in October of 1977, it notified Dr. Marrese that his application for fellowship

had been rejected and that he could reapply for admission in 3 years. A copy of the letter by which Dr. Marrese was notified is attached as an exhibit to the Amended Complaint.

"40. Thereafter, on December 2, 1977, he once again requested that any adverse information contained in his admission file, relied upon by Defendant in rejecting his candidacy, be disclosed to him, in summary form at least, and that he be granted the opportunity to rebut the same in writing or in person, and that his application be thereafter reconsidered, or in the alternative, the three-year requirement for reapplication be waived."

Response: The academy lacks sufficient information to form a belief as to the truth of the allegations stated in Paragraph 40.

"41. However, at present and at all times since the aforesaid rejection, Defendant Academy has continued to refuse disclosure of the contents of Dr. Marrese's file or to afford him any opportunity to rebut the charges contained therein or to reconsider his application, and has further refused to waive its three-year reapplication rule."

Response: The Academy denies each and every allegation stated in Paragraph 41 except to acknowledge that it has maintained Dr. Marrese's admission file, like the admission files of all other successful and unsuccessful applicants, on a confidential basis as provided by the Academy's By-Laws and in conformity with the applicant's written agreement. Further, the Academy acknowledges that it made no exception for Dr. Marrese with respect to reconsideration of his application or with respect to his right to apply again after 3 years following his failure to be elected to fellowship.

"42. Three principal reasons for Dr. Treister's exclusion from the Academy were (a) his supposed willingness to offer expert testimony against other orthopaedic surgeons in medical malpractice cases; (b) his known willingness to consult surgical out-patients on a relatively high-volume basis; and (c) his nonconformity of personality and personal attitudes with those of most established orthopaedic surgeons and

in particular those who were already members of the Academy. All three of these reasons were either stated or implied by Dr. Kolb in the course of the interview described in Paragraphs 17-23 hereinabove."

Response: The Academy lacks information sufficient to form a belief as to the truth of the allegations contained in Paragraph 42 of the complaint.

"43. On information and belief, neither Dr. Treister's nor Dr. Marrese's professional expertise, medical ethics or devotion to his patients' welfare was ever questioned during the application process."

Response: The Academy denies each and every allegation stated in Paragraph 43 of the complaint.

"44. Both Dr. Treister and Dr. Marrese's continued exclusion has been arbitrary, in violation of fundamental due process and competitive fairness and for reasons totally extraneous to the occupational qualifications for admission set forth in the Academy's By-Laws (a copy of which is attached hereto and incorporated herein by reference as Exhibit E). Those qualifications are as follows:

(a) Certification by the American Board of Orthopaedic Surgery;

(b) Medical practice devoted exclusively to orthopaedic surgery and for at least three years subsequent to the completion of the period of formal training;

(c) Citizenship or practice in the United States or Canada; and

(d) Good moral character and adherence to the Principles of Medical Ethics of the American Medical Association."

Response: The Academy denies each and every allegation stated in Paragraph 44 except to acknowledge that qualifications for active fellowship in the Academy are set forth in the By-Laws, a copy of which is attached as an exhibit to the Amended Complaint.

"45. Both Plaintiffs complied with all the occupational qualifications listed above. They also complied with all relevant procedural requirements for completion of their applications, including their sponsorship by the requisite number of Fellows of the Academy."

Response: The Academy lacks sufficient information to form a belief as to the truth of the allegations stated in

Paragraph 45 except to acknowledge that Dr. Marrese and Dr. Treister submitted properly completed applications for membership and were sponsored by the requisite number of fellows of the Academy.

"46. Yet, because of extraneous additional factors that the Academy could not legally include in its official criteria (including but not limited to, in Dr. Treister's case, the three factors mentioned hereinabove in Paragraph 42), both applications were denied."

Response: The Academy denies each and every allegation stated in Paragraph 46 except to acknowledge that neither Dr. Marrese nor Dr. Treister was elected a fellow of the Academy.

"47. Said extraneous additional factors were jointly considered and jointly applied by conspiring members of the Academy, first in determining the Admissions Committee's respective recommendations to the Board of Directors and then in making the Board of Directors' respective negative decisions."

Response: The Academy denies each and every allegation stated in Paragraph 47.

"48. The By-Laws and other rules and regulations of the Academy contemplated, invited and encouraged the application of the aforesaid extraneous additional factors by: (a) forbidding the disclosure of any information in any applicant's file except to the Admissions Committee and the Board of Directors; (b) forbidding any applicant to "question" in any manner any adverse decision; (c) failing to limit the grounds of any recommendation or rejection decision to the specific occupational criteria mentioned hereinabove in Paragraph 44; (d) requiring a two-thirds approving vote by the Board of Directors for the acceptance of any application; (e) failing to require that any disapproving vote must constitute a finding by said Board of Directors of the noncompliance of the applicant with the specific occupational criteria mentioned hereinabove in Paragraph 44; (f) making every Academy member's continued nondisclosure of the contents of any application file or of the reason for any application decision, after such decision, a requirement of continued eligibility for membership in the Academy."

Response: The Academy denies each and every allegation stated in Paragraph 48 except to acknowledge that its By-Laws and the written agreement of each applicant require that admission files be maintained on a confidential basis. Further,

the Academy By-Laws require a 2/3 vote by the Board of Directors for acceptance of any applicant to fellowship.

"49. The exclusion of Doctors Treister and Marrese in the aforesaid circumstances served no proper competitive purpose but, on the contrary, had the purpose and effect of coercing them and other orthopaedic surgeons who hoped to become members of the Academy to avoid any public criticism of their colleagues (particularly, those who were already members) or any significant display of nonconformity with the latter's currently favored social or business practices. Whatever valid ethical or professional purposes might have been served by exclusion on the basis of specific controvertible charges based on specific job-related criteria were not served by exclusion based on unknown charges and a one-third veto vote of competitors."

Response: The Academy denies each and every allegation stated in Paragraph 49.

"50. The exclusion of Plaintiffs was part of a continuing contract, combination or conspiracy by all the members of the Academy, acting through the Academy, to limit competition and enforce conformity with current business practices, both by excluding nonconforming practitioners and by implicitly threatening all appli-

cants who might otherwise tend not to conform. The "additional" admissions criteria to be considered by the Admissions Committee(s) and Board of Directors have been left vague, arbitrary and unchallengeable because the members of the Academy have collectively desired such arbitrary control over entrants."

Response: The Academy denied each and every allegation stated in Paragraph 50.

"51. The continuing limitation of competition is a necessary and inevitable result of the arbitrary discretion given to the Admissions Committee(s) and the Board of Directors by the Academy's By-Laws and other rules and regulations, and the absence of procedural protections for applicants."

Response: The Academy denies each and every allegation stated in Paragraph 51.

"52. There are many other examples of this anticompetitive effect throughout the country, including the case of Dr. Federic Huffnagle in Danvers, Massachusetts, who has informed Plaintiffs' attorneys of his belief that he has been excluded from membership in the Academy because of his willingness to perform back operations upon patients referred to him by chiropractors."

Response: The Academy denies each and every allegation stated in Paragraph 52 except to acknowledge that a Dr. Fredric T. Huffnagle was not elected to fellowship in the Academy.

"53. The refusal of Defendant to allow either Plaintiff to have access to the information contained in his file constituted a related combination or conspiracy on the part of all the responsible individual members of the Academy to conceal the anticompetitive nature of the secret charges made against Plaintiffs and the anticompetitive intent of the Directors in making their ultimate exclusionary decisions. On information and belief, this related conspiracy continues to this day with the design of destroying the file records as soon as they are removed from court protection."

Response: The Academy denies each and every allegation stated in Paragraph 53 except to acknowledge that the admission files of Dr. Marrese and Dr. Treister have been maintained on a confidential basis as is true for all applicants, successful or unsuccessful. The Academy further states that it is and has always been its

policy to delete all materials from admissions files within one year, except for the application form and a copy of correspondence notifying the applicant of his or her admission to the Academy, or failure to be elected to the fellowship. Because of the pendency of litigation by Dr. Treister and Dr. Marrese, their application files have been removed from Academy offices and the contents of those files will not be deleted until the conclusion of this litigation.

"54. This related conspiracy is purportedly justified by provisions of the Academy's By-Laws prohibiting rejected applicants to question the rejection decision or to learn or disclose any information in their files, and is further purportedly justified by a lately instituted, so-called Automatic Document Destruction policy of Defendant."

Response: The Academy denies each and every allegation stated in Paragraph 54, except as acknowledged in response

to Paragraph 53, and acknowledges that the Academy's By-Laws control the question of confidentiality of application files.

"55. Plaintiffs' aforesaid exclusion from membership in the Academy has been implemented by, among other things, the omission of their names from nationally circulated membership rosters."

Response: The Academy denies each and every allegation stated in Paragraph 55, except to acknowledge that the names of Dr. Marrese and Dr. Treister have not been included in the list of Fellows of the Academy.

"56. The aforesaid contracts, combinations and conspiracies have substantially and directly injured and affected trade and commerce among the several states in the provision of orthopaedic surgical services. They have deliberately lowered the standard and restricted the variety and quantity of orthopaedic surgical care provided to patients throughout the country, including those who are insured under the Medicare and Medicaid Programs."

Response: The Academy denies each and every allegation stated in Paragraph 56.

"57. By reason of said boycotts in violation of Section 1 of the Sherman Act, Plaintiffs have been and will continue to be injured in their business and property, including the loss of profit and good will up to the date of filing of this Complaint. Plaintiffs will lose referrals, will be obliged to pay higher insurance rates, will be denied access on equal terms to the latest professional knowledge and opinion, will become less desirable as expert witnesses, consultants or group practice partners, and may lose hospital privileges at various institutions."

Response: The Academy denies each and every allegation stated in Paragraph 57.

"58. Dr. Treister has on various occasions been obliged to disclose his rejection for Academy membership in all the professionally important contexts mentioned hereinabove in Paragraph 12, and to attempt to explain the Academy's rejection decision. He was recently interrogated on this point in connection with his pending application to the American College of Surgeons."

Response: The Academy lacks sufficient information to form a belief as to the truth of the matters stated in Paragraph 58, except to state that it does not

believe anyone is obliged to disclose rejection of an application for membership in the Academy in any professionally important context.

"59. Both Plaintiffs have also been asked many times by their professional colleagues why they have not yet been admitted to the Academy, and both Plaintiffs have been informed of widespread suspicions about the reasons for their rejection."

Response: The Academy lacks sufficient information to form a belief as to the truth of the matters stated in Paragraph 59.

"60. Dr. Marrese knows of at least one highly qualified surgeon, formerly at the DuPont Institute in Delaware, who declined to join him in practice because of his nonmembership in the Academy."

Response: The Academy lacks sufficient information to form a belief as to the truth of the matters stated in Paragraph 60.

"61. Dr. Treister knows of at least two similar instances where surgeons declined to join his practice on the basis of warnings from the chief of their resi-

dency program that he (Dr. Treister) was having 'trouble' with the Academy and that there was 'something wrong.'"

Response: The Academy lacks sufficient information to form a belief as to the truth of the matters stated in Paragraph 61.

"62. Both Plaintiffs have been forced to wear special, humiliating, non-member badges at Academy meetings and functions that they have attended, and have been charged more but ranked last in priority for continuing education programs."

Response: The Academy denies each and every allegation as stated in Paragraph 62 except to acknowledge that:

(a) The name tag issued to non-fellows at Academy meetings and educational programs is a different color than that which is issued to fellows, but further states that other categories of members also wear name tags

of a different color than do fellows.

(b) Non-members, who do not pay Academy dues, are charged a slightly higher price to participate in educational programs sponsored by the Academy and, theoretically, fellows in the Academy are given priority in attenting continuing education programs in instances where attendance must be limited. Upon information, the Academy believes there has been no instance in which either Dr. Marrese or Dr. Treister did not participate in a continuing education program sponsored by the Academy because, due to over-subscription, their status as

non-fellows prevented them from participating in the seminar.

"63. Further, when the adverse decision of the Illinois Appellate Court was issued in Dr. Treister's previous state-law action for relief against the Academy, the Forkosh Memorial Hospital in Chicago, Illinois, denied his application for permanent staff privileges. Those privileges were only later obtained as the result of separate legal action."

Response: The Academy lacks sufficient information to form a belief as to the truth of the matters stated in Paragraph 63.

"64. The total amount of the above damages, both present and future, can best be approximately prior to discovery) at THREE MILLION DOLLARS ($3,000,000) in each Plaintiff's case. Plaintiffs are, therefore, each entitled to recover NINE MILLION DOLLARS ($9,000,000) from Defendant, plus costs and attorney's fees, pursuant to Section 4 of the Clayton Act, 15 U.S.C. Section 15."

Response: The Academy denies each and every allegation stated in Paragraph 64 of the complaint.

COUNT II

"1-63. For Paragraphs 1-63 of Count II, Plaintiffs reallege the allegations of Paragraphs 1-63 of Count I of this Amended Complaint."

Response: In response to Paragraphs 1-63 of Count II, the Academy repeats its responses to Paragraph 1-63 and incorporates them herein by reference.

"64. The foregoing allegations clearly establish a prima facie case of the per se illegality of the above exclusions as a boycott prohibited by, e.g., McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008 (S.D. Ill., S.D. 1974), aff'd by unpublished order 506 F. 2d 1404 (7th Cir. 1974, and Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389, rehearing denied 375 U.S. 870 (1963). There is a substantial likelihood that Plaintiffs will prevail on the merits."

Response: The Academy states that Paragraph 64 is a legal conclusion as to which no response is necessary. Insofar as any portion of Paragraph 64 is construed to constitute a factual allegation, the Academy denies each and every such "allegation."

"65. Both Plaintiffs will suffer irreparable harm to their business if the unlawful conduct of the Defendant is not enjoined, since their loss of future income resulting from the boycott will not be exactly calculable and is difficult even to approximate. Damages cannot fairly compensate the Plaintiffs for the loss of honor and professional reputation suffered by reason of Defendant's boycott. Because the Academy is unique in its field, the benefits of membership therein are irreplaceable."

Response: The Academy denies each and every allegation stated in Paragraph 65.

"66. The injury to Plaintiffs is great and the granting of equitable relief will do little harm to Defendant. Plaintiffs' inclusion as members of the Academy could not appreciably injure the Academy or impair its functions, whereas their continuing exclusion inflicts continuing short and long-term injuries upon Plaintiffs' careers. No public interest is served by continuing to allow total arbitrariness in the Academy's admissions procedures, whatever the specific intention behind their application in the Plaintiffs' case."

Response: The Academy denies each and every allegation stated in Paragraph 66.

"67. Defendant's attorneys have made various references to Defendant's so-called Automatic Document Destruction policy. On information and belief, any such policy was instituted subsequent to the commencement of legal action against Defendant by Dr. Treister and was and is designated to thwart the Plaintiffs' proof of the charges of anticompetitive motivation and coercion made herein. The above documentary "policy" and Defendant's proclaimed reliance upon By-Laws of the Academy that prohibit any disclosure of the contents of application files (even to a court) create an imminent risk of the destruction of both Plaintiffs' files unless a temporary restraining order and injunction are issued."

Response: The Academy denies each and every allegation stated in Paragraph 67.

FIRST AFFIRMATIVE DEFENSE

For its first affirmative defense, the Academy states that this claim is barred by the written agreement of each plaintiff, entered into at the time his application for fellowship was submitted, to honor the confidentiality of the process by which applicants are recommended for fellowship

in the Academy and not seek to obtain access to the application file of the Academy, the results of the Academy's investigation, or the recommendations regarding the applicant.

SECOND AFFIRMATIVE DEFENSE

For its second affirmative defense, the Academy states that its failure to elect Dr. Marrese to fellowship in the Academy, and its failure to elect Dr. Treister to fellowship in the Academy, constitute separate, unrelated, unilateral acts of the Academy which do not constitute a combination or conspiracy in restraint of trade.

THIRD AFFIRMATIVE DEFENSE

For its third affirmative defense, the Academy states that the alleged disadvantage to Dr. Marrese or to Dr. Treister in not being elected a fellow of the Academy is

not an injury to their business or property which could be cognizable under the federal antitrust laws.

FOURTH AFFIRMATIVE DEFENSE

For its fourth affirmative defense, the Academy states that this action is barred by principles of collateral estoppel in that these plaintiffs have previously litigated their claim of entitlement to fellowship in the Academy by reason of the alleged "practical necessity" of such fellowship to their professional practice. In dismissing the same claim with prejudice, the Illinois Appellate Court based its decision on the fact, established in the pleadings, that Academy membership is not an economic necessity. Any liability under the federal antitrust laws would require a factual determination inconsistent with the facts upon which the final judgment

of dismissal by the Illinois Appellate Court is based.

FIFTH AFFIRMATIVE DEFENSE

For its fifth affirmative defense, the Academy states that this action is barred by principles of res judicata in that the facts, the legal issues, and the relief sought in this action could have been pursued by these plaintiffs in their first, unsuccessful litigation before the Illinois state courts, which resulted in a judgment of dismissal with prejudice.

SIXTH AFFIRMATIVE DEFENSE

For its sixth affirmative defense, the Academy states that this court lacks federal subject matter jurisdiction by reason of the fact that admission to fellowship in the Academy is not an act which takes place within interstate commerce or which substantially affects interstate commerce.

WHEREFORE, the American Academy of Orthopaedic Surgeons respectfully prays the Court to enter judgment in its favor and against the plaintiffs, dismissing this cause and awarding it the costs of this action.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

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RESPONDENT'S

BRIEF

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No. 83-1452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

R. ANTHONY MARRESE, M.D. and MICHAEL R. TREISTER, M.D.,

Petitioners,

vs.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

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No. 83-1452

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AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,

Respondents.

BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

Petitioners filed separate lawsuits in Illinois seeking redress for the alleged wrongful rejection of their membership applications by the American Academy of Orthopaedic Surgeons (Academy). After suffering adverse judgments in Illinois, petitioners joined in a federal court lawsuit charging anti-trust violations arising out of the Academy's rejection of the same membership applications. The Academy moved to dismiss on *res judicata* (claim preclusion) grounds. This motion raised the issue of the effect the federal court must give to a state court judgment.

The Full faith and Credit clause and 28 U.S.C. §1738 require that a judgment of a state court have the same credit, vitality, and effect in every other court in the United States which it had in the state where it was rendered. *Thomas v. Washington Gas Light Company*, 448 U.S. 261, 270 (1980).

Because the Illinois *res judicata* doctrine precludes not only questions actually litigated but all questions which could have been raised or determined (*Spiller* v. *The Continental Tub Company*, 95 Ill.2d. 423, 432, 447 N.E.2d 834, 838 (1983)), all further litigation in Illinois arising out of the rejection of petitioners' applications is precluded if the doctrine is applicable. The Illinois doctrine requires an identity of both parties and cause of action and a final judgment upon the merits within the jurisdiction of the court rendering it. *People* v. *Kidd*, 398 Ill. 405, 408, 75 N.E.2d 851, 853 (1947).

An identity of cause of action exists if there is a single core of operative facts giving the plaintiff a right to seek redress for the wrong concerned, even though those facts may give rise to different claims for relief upon different theories of recovery. Thus, any later litigation in Illinois between these parties arising out of the Academy's rejection of petitioners' membership applications would be barred. Section 1738 requires a state judgment to have the same effect in the federal court and therefore the present action is barred.

The fact that the federal courts have exclusive jurisdiction of federal anti-trust claims does not change this result. Application of full faith and credit does not require a determination of whether the state rendering the first judgment would bar the action pending in the federal court. Instead, the federal court action is barred if the state rendering the judgment would bar further actions in the state courts between the parties over the same grievance.

It is not a requirement of *res judicata* that the forum rendering the prior judgment have jurisdiction of the claim or theory being raised in the second lawsuit. Rather it is required that the first forum have jurisdiction of the claim raised in the first lawsuit; otherwise the first judgment would be null and void and subject to collateral attack, which is the antithesis of *res judicata*. It is also a requirement that a claim, which was not litigated in the first action, could have been raised at the time the cause of action occurred and the

plaintiff was contemplating seeking judicial relief. Obviously, *res judicata* should not bar claims which had not come into existence at the time the first lawsuit was instituted.

Petitioners' contention that there is an implied exception to §1738 when a federal antitrust action is involved is without merit. The statute contains no express exception of any kind. No exception will be recognized unless a later statute contains an express or implied partial repeal. *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980). The Sherman and Clayton Acts contain no express repeal. An implied repeal requires either an irreconcilable conflict between two acts so that the later act, to the extent of the conflict, constitutes an implied repeal or a later act which covers the whole subject ...' the earlier one and is clearly intended as a substitute. *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 468 (1982), quoting *Radzanower* v. *Touche, Ross & Co.* 426 U.S. 148, 154 (1976). There is no irreconcilable conflict between §1738 and the antitrust statutes. Nor do the antitrust statutes cover the subject of §1738. Petitioners' references to the importance of private anti-trust enforcement as a basis for an exception is an attempt to have this Court substitute judgment for that of Congress.

Even if §1738 did not govern this case, the federal principles of *res judicata*, which provides that a final judgment on the merits bars further claims by parties or their privies based on the same cause of action, bar this action. *Montana* v. *United States*, 440 U.S. 147, 153 (1979). Like Illinois, federal *res judicata* considers identity of cause of action to exist if the two lawsuits arise out of the same basic factual situation. *See Himel* v. *Continental Ill. Nat. Bank & Trust*, 596 Fed. 2d. 305 (7th Cir. 1979) and *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 296 Fed. 2d. 362 (5th Cir. 1961). In this instance, petitioners were in an offensive posture in both the Illinois courts and the federal courts. They were not coerced into litigating in a jurisdiction which could not entertain all

of the theories arising out of the rejection of their membership applications. In the absence of such coercion, no basis for an exception to the *res judicata* doctrine exists.

ARGUMENT

I. THIS ACTION IS BARRED BY THE FULL FAITH AND CREDIT STATUTE BECAUSE THE PRIOR ILLINOIS COURT JUDGMENTS PRECLUDE A SUBSEQUENT SUIT IN ILLINOIS BASED ON THE SAME CAUSE OF ACTION.

Upon their failure to be elected to membership in the Academy, each petitioner sued the Academy in the Illinois courts. (Joint App. 168 and 224) The Appellate Court of Illinois held that Treister's action was not maintainable and entered judgment for the Academy. *Treister* v. *American Academy of Orthopaedic Surgeons*, 78 Ill. App.3d 746, 755–756, 396 N.E.2d 1225, 1232 (1979). The petitioners then filed the present action in the federal court. (R. NR. 1) Marrese's state court action, which had been stayed pending the *Treister* appeal, was dismissed on the Academy's motion (Joint App. 161).

The Academy moved to dismiss the federal antitrust action on the grounds that it was barred by the doctrine of *res judicata*. (Joint App. 156) The Seventh Circuit reversed the district court's denial of this motion and held that the antitrust action is barred. This case presents the question whether a final adjudication by a state court of general jurisdiction precludes relitigation of the same grievance between the same parties in federal court on a different legal theory that is within the exclusive jurisdiction of the federal courts.

Because petitioners filed their original lawsuits in Illinois and their second in federal court, the first issue raised by the motion to dismiss would appear to one of choice of laws—whether to use the Illinois or federal law of *res judicata*. However, because courts never have an opportunity to

directly decide the extraterritorial effect of their decisions, the district court in this case had only two choices: one, give the same preclusive effect to the Illinois judgments which Illinois would give regarding further lawsuits in Illinois, or, two, apply the federal common law of *res judicata*.

In actuality, this is more than a choice of laws issue. It is an issue generated by our federal system—what effect do the different jurisdictions give to each other's judgments. The issue was not unanticipated, but is covered by the full faith and credit cause of the Constitution (U.S. Const. Art. IV, §1) and its implementing legislation (28 U.S.C. §1738). The pertinent provision of §1738 is:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

By enacting this statute, "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." *Allen* v. *McCurry*, 449 U.S. 90, 96 (1980). "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 466 (1982).

Thus, in relating *res judicata* to full faith and credit, Professor Moore notes that a judgment that is *res judicata* in the rendering jurisdiction is *res judicata* in all courts, state and federal, so that to the extent a judgment precludes further litigation in the rendering jurisdiction, it precludes further litigation elsewhere. 1B *Moore's Federal Practice*, Par. 0.406[1] at 266-268. *Thomas* v. *Washington Gas Light Company*, 448 U.S. 261, 270 (1980) recognizes that, by virtue of §1738, a state court judgment has the same credit, vitality, and effect

in every court in the United States as it had in the rendering state. The plurality notes that "a straight-forward application of the full faith and credit law" results when: a cause of action arises; relief is granted by a forum; that relief precludes any further relief in that forum; and further relief is precluded elsewhere as well. 448 U.S. at 280. While this means a state is permitted to determine the extraterritorial effect of its judgment, it does so only indirectly, by prescribing the effect of the judgment within the state. 448 U.S. at 270. *See* also *Kremer* v. *Chemical Construction Corporation*, 456 U.S. 461, 466–467 (1982):

> There is no question that this judicial determination precludes Kremer from bringing "any other action, civil or criminal, based upon the same grievance" in the New York courts. [citation omitted] By its terms, therefore, §1738 would appear to preclude Kremer from relitigating the same question in federal court.

Consequently, if an Illinois court would preclude a subsequent action in Illinois based on the Academy's failure to elect petitioners to membership, this court must also bar any action premised on the membership dispute. Thus, it becomes necessary to examine the Illinois *res judicata* doctrine.

Like most states, Illinois has doctrines of *res judicata* and collateral estoppel (issue preclusion). These doctrines "are . . . designed to protect litigants from the burden of retrying an identical cause of action or issue with the same party or privy, and to enhance judicial economy by prohibiting repetitive litigation." *People* v. *Rose*, 82 Ill.2d 282, 286, 412 N.E.2d 444 (1980), *cert. denied*, 454 U.S. 839, 102 Sup. Ct. 145, 70 L.Ed.2d 120 (1981). Illinois recognizes that "[f]ew rules are more essential or more firmly embedded in our jurisprudence than that of *res judicata*. It is a judicially created doctrine resulting from the practical necessity that there be an end to litigation and that controversies once decided on their merits shall remain in repose." *Hughey* v. *The Industrial Commission*, 76 Ill.2d 577, 582, 394 N.E.2d 1164, 1166 (1979). In addition to the desire for judicial economy and consistency, *res judicata* is founded upon the equity of preventing the harassment of a defendant with a second lawsuit for the same cause of action by the simple expedient of limiting the theories of recovery advanced in the first lawsuit. *Morris* v. *Union Oil Company of California*, 96 Ill. App.3d 148, 154, 421 N.E.2d 278, 283 (1981).

The Illinois *res judicata* doctrine provides "that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." *People* v. *Kidd*, 398 Ill. 405, 408, 75 N.E.2d 851, 853, (1947). When a prior adjudication is asserted as an absolute bar to a later action, the "only questions to be determined" are whether: (1) the cause of action in the same in both proceedings; (2) the two actions are between the same parties or their privies; (3) the former adjudication was a final judgment upon the merits; and (4) the prior adjudication was within the jurisdiction of the court rendering it. *Kidd*, 398 Ill. at 408–409.

With respect to whether the two lawsuits involve identical causes of action for *res judicata* purposes the Supreme Court of Illinois has said:

> A cause of action consists of the right belonging to the plaintiff for some wrongful act or omission done by the defendant by which that right has been violated; the thing done or omitted to be done which confers the right upon the other to sue—that is, the act or wrong of the defendant against the plaintiff which caused a grievance for which the law gives a remedy. [Citations] A cause of action includes every fact necessary for the plaintiff or the complainant to prove to entitle him to succeed and every fact which the defendant would have a right to traverse; the right to prosecute an action with effect. [Citations]

City of Elmhurst v. *Kogerman*, 392 Ill. 195, 205–206, 64, N.E.2d 450, 454 (1945).

In both their state and federal lawsuits, petitioners assert a right to Academy membership and its benefits and a breach of that right based on the respondent's allegedly wrongful rejection of their membership applications. The fact that the operative facts surrounding a defendant's wrongful act may support the assertion of different kinds of relief or different theories of recovery does not create separate causes of action for *res judicata* purposes. Illinois has held that lawsuits asserting different kinds of relief or different theories of recovery as a result of a single group of operative facts constitute only one cause of action for *res judicata* purposes. *Piercy* v. *H. P. Karl Contractors, Inc.*, 39 Ill. App.3d 1057, 1061, 351 N.E.2d 249, 252–253 (1976). As *Morris* v. *Union Oil Company of California*, 96 Ill. App.3d 148, 157, 421 N.E.2d 278, 285 (1981), observes:

> Thus, a cause of action consists of a single core of operative facts which give the plaintiff a right to seek redress for the wrong concerned. Even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action. If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted and *res judicata* bars the latter action.

The same core of operative facts was involved in petitioners' state court lawsuits as is involved in the federal lawsuit. All three actions seek redress for the Academy's alleged wrongful failure to elect petitioners to membership. Consequently, the facts surrounding petitioners' applications and their consideration by the Academy are essential to maintaining both proceedings and represent evidence needed to sustain both. Similarly, the nature of the Academy, its relationship to and effect on the health care community, in general, and on and to the petitioners, in particular, are also

essential facts in both proceedings. An essential element of petitioners' state court actions was the economic necessity of membership in the Academy for a practicing orthopedic surgeon. *Provitola*, 78 Ill. App.3d at 755, 396 N.E.2d at 1231. The facts and evidence central to the issue of economic necessity are also central to the issues of antitrust violation and antitrust injury.

The second requirement of identity of parties is also present. The state court actions were between the same parties as the present action. The petitioners each sued the Academy in state court, albeit in separate lawsuits. (Joint App. 168 and 224) In this action, the petitioners joined in a common suit against the Academy.

Also present are final adjudications on the merits in the prior lawsuits. A judgment dismissing an action for failure to state a cause of action is a final judgment on the merits. Rule 273 of the Illinois Supreme Court (Ch. 110A, Sec. 273, Ill. Rev.Stat. (1979)) provides that such a dismissal, barring failure of jurisdiction, venue or joinder of necessary parties, operates as an adjudication upon the merits. *Morris* v. *Union Oil Company of California*, 96 Ill. App.3d 148, 421 N.E.2d 278, 284 (1981) held that a dismissal upon the pleadings for failure to state a cause of action was a decision on the merits.

Lastly, there is no contention that the state court judgments were not within the jurisdiction of the Illinois courts. The Illinois circuit courts have "original jurisdiction over all justiciable matters." Ill. Const. of 1970, Art. V, §9.

Thus, the four elements required by Illinois for application of *res judicata* are present in this case. Under §1738, it must next be determined whether the effect of the doctrine precludes petitioners from bringing any other action in the Illinois courts based upon the same grievance. If it does, §1738 precludes petitioners from relitigating the same question in federal court. *Kremer*, 456 U.S. at 466-467. In Illinois, the bar of *res judicata* "extends not only to questions which were actually litigated but also to all questions which could

have been raised or determined." *Spiller* v. *The Continental Tube Company*, 95 Ill.2d 423, 432, 447 N.E.2d 834, 838 (1983). Thus, any other claim or question arising out of the Academy's failure to elect petitioners to membership is barred by the prior adjudications, whether or not such claims or questions were raised in those lawsuits.

The primary basis for petitioners' contention that their antitrust claim is not barred is that it is a claim that could not have been raised in the Illinois lawsuits because federal courts have exclusive jurisdiction of federal antitrust claims. This contention is flawed on two grounds. First, as noted, the issue is whether the prior judgments bar further Illinois lawsuits. Second, petitioners are improperly narrowing the doctrine's effect by limiting it to those claims which could have been raised within the jurisdictional limits of the first forum selected by the plaintiff, rather than to the claims that could have been raised, regardless of forum, when the cause of action accrued.

Because under §1738, the extraterritorial effect of a state judgment is measured by the judgment's internal effect within the state, any consideration of jurisdictional limitations is confined to the jurisdiction of the state's courts. The Illinois circuit courts have "original jurisdiction over all justiciable matters." Ill. Const. of 1970 Art. V, §9. Consequently, any claims asserted in a later Illinois lawsuit arising out of petitioners' membership applications are claims that could have been raised in the initial lawsuits. As a result, the effect of the Illinois judgments is to bar any further claims in Illinois, even under petitioners' concept of jurisdictional competency.

Indeed, this indirect determination of the extraterritorial effect of a state's judgments is a matter of necessity when the second lawsuit is pending in a foreign forum with exclusive jurisdiction over the claim asserted. Because the state does not have jurisdiction of the claim in the second lawsuit, it would never have occasion to decide the preclusive effect of its own judgment on the second lawsuit. Even if the second

lawsuit were mistakenly filed in the first forum, it would be dismissed for want of jurisdiction.

Moreover, petitioners' contention that the effect of *res judicata* is limited to issues which could have been raised or determined in the forum of the first judgment is based on a literal reading of the language in some Illinois cases which ignores both the language's context and Illinois' policy against splitting of causes of action. The *res judicata* doctrine "extends not only to questions which were actually litigated but also to all questions which could have been raised or determined." *Spiller* v. *The Continental Tube Company*, 45 Ill.2d 423, 432, 447 N.E.2d 834, 838 (1983). *Spiller* does not qualify the language "questions which would have been raised or determined" by limiting it to questions which could have been raised in the prior lawsuit. Instead it states "all questions." Petitioners also cite *Spiller*, but add their own qualifying language by stating that the doctrine bars issues which "'could have been raised or determined' in the original state court action." (Ptr. br. 17)

Some Illinois opinions do go beyond the language of *Spiller*, and after stating that the former suit is conclusive as to all questions actually decided, contain language to the effect that the doctrine also bars all questions which could have been raised or determined "in that action." *See City of Elmhurst* v. *Kegerreis*, 392 Ill. 195, 203, 64, N.E.2d 450 (1945). However, in those cases, both the first and second lawsuits were filed in Illinois. Because the forum of both lawsuits is the same, any inability to raise an issue in the prior lawsuit which is raised in the second would not result from a lack of jurisdiction, but from some other reason, such as the second issue not having matured at the time of the filing of the first action. *See LaSalle National Bank* v. *County Board of School Trustees*, 61 Ill.2d 524, 531, 337 N.E.2d 19 (1975), *cert. den.*, 425 U.S. 936 (1976) (where plaintiff argued that a former judgment cannot bar a right not yet in existence); and *Consolidated Distilled Products, Inc.* v. *Allphin*, 73 Ill.2d 19, 28, 382 N.E.2d 217, 220 (1978) (limiting *res judicata* effect of first tax

suit to taxes for years prior to first suit "reflects the commonsense notion that it would be grossly unfair to apply the principle of *res judicata* to matters relating to tax years subsequent to the prior adjudication when the prior adjudication could not have anticipated a possible change in circumstances.")

The dissent below, quotes *People* v. *Kidd*, 398 Ill. 405, 408, 75 N.E.2d 851 (1947) to support the proposition that the Illinois *res judicata* doctrine possesses a jurisdictional competency requirement. (App. to Joint Ptn. A-52—A-53) While *Kidd* discusses the first forum's jurisdiction, it is concerned with jurisdiction over the first claim, not the second. *Kidd* states, "The doctrine of res judicata*** is that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties***." *Kidd*, 75 N.E.2d at 853. *Kidd* then notes that *res judicata* requires a determination that the former adjudication was a final judgment upon the merits "within the jurisdiction of the court rendering it." Thus, *Kidd* discusses the jurisdiction of the first court over the claim on which it rendered judgment, not over the claim pending in the second lawsuit. The first judgment is required to be within the jurisdiction of the court rendering because a judgment by a court lacking subject matter jurisdiction is null and void and thus may be collaterally attacked. *Kidd*, 75 N.E.2d at 854. Petitioners completely reverse the "judicial competency" requirement by seeking to apply it to the first forum's jurisdiction to hear the second claim rather than the first claim.

Petitioners' contention that *res judicata* bars claims that could have been raised only if the claims are within the jurisdiction of the forum selected for the first lawsuit would measure the effect of *res judicata*, not by the choices available to a plaintiff at the time his cause of action has accrues, but by the choices remaining after he choses a forum. Such a measure would allow a plaintiff to split his cause of action when one of the theories arising out of the single core of

operative facts was within the exclusive jurisdiction of a forum other than that initially selected by the plaintiff.

Such claim splitting is contrary to the policy and purpose of *res judicata*. "The law requires that both in law and in equity plaintiff must present all grounds of recovery he may have. He cannot preserve the right to bring a second action after loss of the first merely by limiting the theories of recovery opened by the pleadings in the first action." *Prochotsky* v. *Union Central Life Insurance*, 2 Ill. App.3d 354, 356, 276 N.E.2d 388, 390 (1971). This policy is based upon "the plainest and most substantial justice, that litigation should have an end and that no person should be unnecessarily harrassed with a multiplicity of suits." *Baird & Warner* v. *Addison Industrial Park*, 70 Ill. App.3d 59, 64, 387 N.E.2d 831, 837 (1979).

If *res judicata* is to achieve its purposes, its effect must extend to all matters which could have been raised at the time the cause of action accrued regardless of the jurisdiction of the forum selected for the first lawsuit. Any other result would allow a plaintiff to take advantage of a technicality, such as a court's exclusive jurisdiction to hear one of his claims, to try his claims one at a time until successful. This Court has noted that the public policies served by *res judicata* are too important to be frustrated by technicalities. *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401–402 (1981).

Petitioners' suggestion that this application of §1738 results in a curtailment of private antitrust enforcement and deprives petitioners of their day in court is not well taken. In this instance, at the time petitioners filed their Illinois lawsuits, all of the facts upon which their federal antitrust complaint is based were in existence and both the Illinois and federal Antitrust Acts were statutes of longstanding. Petitioners, who were in an offensive posture in state court, thus had the option of filing concurrent actions in the state and federal courts, thus preserving access to both forums (*see Migra* v. *Warren City School District Board of Education*, U.S. , 79 L. Ed.2d 56, 64, n.7, 104 S.Ct. 892 (1984)) or filing

in federal court and utilizing pendent jurisdiction to join their state claims. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966)

Section 1738 "emphasizes the view that it is more important to give full faith and credit to state court judgments than to insure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation and a desire to conserve judicial resources." *Migra* v. *Warren City School District Board of Education*, U.S. , 79 L. Ed.2d 56, 64, 104 S.Ct 892 (1984) Notions of comity require that other jurisdictions give a judgment the same effect it would have in the rendering jurisdiction. Here, the effect of the Illinois judgments was to bar further Illinois litigation between the parties. The federal courts should accord it the same effect. Vexatious litigation and the squandering of judicial resources occurs when a plaintiff splits his cause of action as petitioners have done. Included in the purposes of Illinois' *res judicata* doctrine is the prevention of vexatious litigation and the conservation of judicial resources by prohibiting a plaintiff from trying his cause of action one theory at a time until he is successful.

Because the state court judgments bar any further claim in the Illinois courts, §1738 requires the federal courts to give the same preclusive effect which the judgments have on later actions filed in Illinois to later actions filed in the federal courts. Thus, barring some exception to the application of §1738, petitioners' federal antitrust actions are barred. As is demonstrated below, there is no basis to create an exception to §1738.

II. NO EXCEPTION TO THE FULL FAITH AND CREDIT STATUTE EXISTS FOR A PARTY WHO VOLUNTARILY CHOOSES TO LITIGATE ITS CAUSE OF ACTION IN A STATE FORUM, LOSES, AND THEREAFTER ATTEMPTS TO RELITIGATE THE MATTER UNDER A FEDERAL ANTITRUST THEORY.

Petitioners urge this Court to create a sweeping, judicial exception to the full faith and credit mandate of §1738 by holding that no prior state court judgment can ever preclude an exclusively federal claim. Their authorities, however, do not support an exception to the full faith and credit statute under the facts of this case.

After the Academy denied petitioners membership nearly eight years ago, they voluntarily elected to sue the Academy in state court under a variety of theories. (Joint App. 168 and 224) Petitioners did not allege state antitrust violations or file a federal antitrust suit at any time during the four years their state suits were pending. Instead, they waited until they lost the state suit to bring this federal action and have offered no reason why the federal antitrust suit was not brought at the time of their initial suits. (App. to Joint Pet. A-4)

Much of petitioners' authority pre-dates this court's strong reaffirmation of §1738 in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982), and most of their Circuit Court of Appeals cases do not even acknowledge or discuss the duty to afford full faith and credit to prior state court judgments under §1738. *See Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2nd Cir. 1955), *cert. denied* 350 U.S. 825 (1955); *Central States, Etc.* v. *Old Sec. Life Ins.*, 600 F.2d 671, (7th Cir. 1979); *Hayes* v. *Solomon*, 597 F.2d 958 (5th Cir. 1979), *cert. denied* 444 U.S. 1078 (1980); *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 583 F.2d 378 (7th Cir. 1978); *Cotler* v. *Inter-County Orthopedic Ass'n, P. A.*, 526 F.2d 537 (3rd Cir. 1975), *McGough* v. *First Arlington National Bank*, 519 F.2d 552 (7th Cir. 1975); *Clark* v. *Watchie*, 513 F.2d 994 (9th Cir. 1975), *cert. denied*, 423 U.S. 841 (1975); *Abramson* v. *Pennwood Investment*

Corp., 392 F.2d 739 (2nd Cir. 1968); and *Cream Top Creamery* v. *Dean Milk Company*, 383 F.2d 356 (6th Cir. 1967). *RX Data Corp.* v. *Department of Social Services*, 684 F.2d 192, 196 (2nd Cir. 1982) refers to §1738 in its footnote 3 but does not discuss the statute in the opinion.

The failure to consider, much less mention, any obligations under §1738 refutes petitioners' suggestion that these cases "analyzed" or held that exclusive federal claims created an "implied repeal" or immunity from §1738. (Pet. Br. at 24) Petitioners' authorities ignored the mandate of §1738 and are accordingly not useful in determining whether to create an exception to §1738 in this case.

Moreover, the factual circumstances in those decisions may present equitable reasons for allowing the second action. For example, in *Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2nd Cir. 1955), *cert. denied* 350 U.S. 825 (1955), the federal court plaintiff was the defendant in the prior state court action. The reversal of parties in that case provided a logical justification for not precluding the later action. The fortuitous fact that one party brought the dispute to state court first might prevent his opponent from later maintaining a federal antitrust claim. Parties fearing potential treble damage actions by their competitors could avoid them altogether by initiating actions in state court, which might not rule on the defendant's federal antitrust claims, and later argue that the state action barred federal antitrust suits arising from the same set of facts. To protect access to the federal courts, an exception to §1738 might be appropriate. Many of the cases cited by petitioners involve such a reversal of parties and are not applicable here. *See Lyons* v. *Westinghouse Electric Corp.*, 222 F.2d 184 (2nd Cir. 1955), *cert. denied*, 350 U.S. 825 (1955); *Kurek* v. *Pleasure Driveway and Park Dist. of Peoria, Illinois*, 583 F.2d 378 (7th Cir. 1978); *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255 (7th Cir. 1981); *McGaugh* v. *First Arlington National Bank*, 519 F.2d 552 (7th Cir. 1975); and *Turf Paradise, Inc.* v. *Arizona Downs*,

670 F.2d 813 (9th Cir. 1982), *cert. den.*, 456 U.S. 1011 (1982)—in *Turf*, different parties were involved.

In contrast, an exception to §1738 to avoid compelling one party to involuntarily resolve its disputes in a particular forum is not required when, as in this case, both the state and subsequent federal suits were initiated by the same party who had an unfettered opportunity to bring the federal antitrust claim in the first instance. Indeed, courts have precluded lawsuits based on an exclusive federal claim if the plaintiff had previously sought state court relief arising out of the same set of facts. *Nash County Board of Education* v. *Biltmore Company*, 640 F.2d 484, (4th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981); *Connelly* v. *Balkwill*, 174 F. Supp. 49 (D.C. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960); *Kaufman* v. *Shoenberg*, 154 F. Supp. 64 (D.C. Del. 1954); *Fowler Manufacturing Company* v. *Gorlick*, 415 F.2d 1248, 1255 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 24 L.Ed.2d 503 (1970); *Derish* v. *San Mateo-Burlingame Board of Realtors*, 724 F.2d 1347 (9th Cir. 1983).[1]

If a party is not coerced into litigating in a state forum, no federal interest is jeopardized when §1738 is applied to bar a subsequent federal suit based on the same cause of action. That party has voluntarily waived its right to assert the exclusive federal theory, just as in any other case where a litigant elects to forego certain theories of potential recovery. *Nash*, 640 F.2d at 492–493; 1B *Moore's Federal Practice*, Par. 0.410–385; *See* also *Montana* v. *United States*, 440 U.S. 147, 163 (1979); *England* v. *Louisiana Medical Examiners*, 375 U.S. 411, 417 (1964); and *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 427–428

[1] Petitioners' characterization of *Connelly* v. *Balkwill*, 174 F. Supp. 49 (N.D. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960) and *Kaufman* v. *Shoenberg*, 154 F. Supp. 64 (D.Del. 1954) as only "issue" preclusion cases is incorrect. (Pet. Br. at 30). In *Connelly* v. *Balkwell* (*see* 174 F. Supp. at 55–60), *res judicata* is applied to preclude an entire claim; and in *Kaufman* v. *Shoenberg* (*see* 154 F. Supp. at 67), *res judicata* is discussed and applied to bar an entire cause of action.

(1963), where this Court has recognized that a party can waive access to the federal forum by voluntarily litigating its cause of action in the state courts. *See* also *Migra* v. *Warren City School District Board of Education*, U.S. , 79 L. Ed. 2d 56, 64, note 7 (1984).

Denying full faith and credit to the prior state court judgment in this case violates the purpose behind §1738, while failing to advance any other clear Congressional purpose or intent. As Justice White expressed in *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 65 L.Ed.2d 757, 100 S.Ct. 2647 (1980):

> It seems to me grossly unfair that the plaintiff, having the initial choice of the forum, should be given the additional advantage of a second adjudication should his choice prove disappointing. Defendants, on the other hand, would no longer be assured that the judgment of the first forum is conclusive as to their obligations, and would face the prospect of burdensome and multiple litigation based on the same operative facts. Such litigation would also impose added strain on an already overworked judicial system.

448 U.S. at 289 (concurring opinion).

In some of petitioners' authorities the parties were not reversed, but in those cases the plaintiffs exhibited a clear intent not to waive access to the federal forum. Unlike petitioners, they did not wait until their claims in state court were lost to pursue exclusive federal remedies. For example, in *Cotler* v. *Inter-County Orthopaedic Ass'n, P. A.*, 526 F.2d 537 (3rd Cir. 1975), the plaintiff instituted a state court suit and shortly thereafter filed a federal action against the same defendant premised on §10(b)(5) of the Securities Exchange Act of 1934, over which Congress expressly granted exclusive jurisdiction to the federal courts. The issue in *Cotler* was whether the federal action should be stayed pending resolution of the state suit. The Circuit Court of Appeals held it was improper for the federal court to stay the federal suit

because "Here, no matter how long the state court proceedings take, in the end the same district court must take up the §10(b) claim, which cannot be disposed of by the state court." 526 F.2d at 540. Significantly, concern was expressed over the preclusive effects of the state court judgment if the federal suit were stayed. 526 F.2d at 542. Since the plaintiff's federal and state court suits were brought concurrently, the court saw fit to permit the plaintiff to litigate his claims in his chosen state and federal forums. The plaintiff did not wait for a final, adverse judgment in state court before suing in federal court. Accordingly, he did not "waive" his right to pursue the federal remedy as petitioners have done here.

Clark v. *Wakkie*, 513 F.2d 994 (9th Cir. 1975), *cert. denied* 423 U.S. 841 (1975), also relied on by petitioners, involved state and federal lawsuits initiated on the same day by the same plaintiff. The Ninth Circuit considered the 10(b)(5) security issue as a different cause of action from the state claims and indicated there would be no preclusive effect.

Other authorities relied on by petitioners involved federal cases which were filed concurrently with the state suits and nearly all dealt with whether to stay a contemporaneously filed federal suit as opposed to precluding it. *See, Central States, Etc.* v. *Old Sec. Life Ins.*, 600 F.2d 671 (7th Cir. 1979); *Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2nd Cir. 1955); *McGough* v. *First Arlington National Bank*, 519 F.2d 552 (7th Cir. 1975); *RX Data Corp.* v. *Department of Social Services*, 684 F.2d 192 at 195 (2nd Cir. 1982) ("Just after filing suit in the Court of Claims, RX Data filed this copyright infringement action in the District Court for the Southern District of New York."); *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) and *Abramson* v. *Pennwood Investment Corp.*, 392 F.2d 738, 760, 762 (1968) (where the federal suit was filed one year prior to state court suit and in dicta, the court noted that a settlement in the subsequent state suit would not preclude the earlier filed exclusive federal claims).

The plaintiffs in these examples did not waive access to the federal forum. They pursued their exclusive federal

remedies before a final judgment was entered in the state court. Consequently, there is justification for permitting their federal actions to proceed. However, there is no justification for refusing to afford the state judgments in this case full faith and credit when petitioners failed to pursue their federal antitrust claim at any time during the four years their state claims were litigated and have offered no reason whatsoever for their neglect (App. to Joint Pet. A-4). They could have filed an initial federal action joining their state claims under pendent jurisdiction (*United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966)) or litigated in both state and federal forums concurrently (*Migra* v. *Warren City School District Board of Education*, U.S. , 79 L. Ed. 2d 56, 64, n.7 (1984)). Petitioners did neither. Instead, they waited until a final, adverse judgment was entered against them (Cf. App. A-24, n.1) and sought to collaterally attack that judgment and harass the Academy with this lawsuit (App. A-22).

Two of petitioner's authorities appear not to involve a reversal of parties or concurrently filed suits. In *Cream Top Creamery* v. *Dean Milk Company*, 383 F.2d 358 (1967), the court's citation of the "*Lyons* exception" to *res judicata* was *dicta* since it had already held that the second suit alleged antitrust violations which continued or occurred after the first suit. Hence, the second suit was a new cause of action. The *res judicata* issue was discussed "...for the sake of argument..." 383 F.2d at 363. More importantly, the statements made for the sake of argument did not explicitly adopt *Lyons* but pointed out that "There seems to be some question as to whether this rule *res judicata* is applicable..." 383 F.2d at 363. At most, *Cream Top* questioned whether *res judicata* would be applied and is not authority for an exception to §1738—which it failed to cite or discuss.

Petitioners' other case, *Hayes* v. *Solomon*, 597 F.2d 958 (5th Cir. 1979), *cert. den.*, 444 U.S. 1078 (1980), also failed to cite or discuss its duties under §1738. Moreover, it pre-dated *Federated Department Stores* v. *Moitie*, 452 U.S. 394 (1981) which held that no principle of law or equity sanctions an exception

to *res judicata*. The Circuit Court of Appeals in *Hayes* held contrary to *Federated* when it stated:

> The prohibition against splitting a cause of action and the rather Draconian remedy of barring the subsequently filed suit must be applied with discretion and flexibility.

597 F.2d at 983.

Directly contrary to *Hayes*, this court noted in *Federated* that *res judicata* is not inherited from a more technical time but is a rule of fundamental justice to be cordially regarded and enforced, without exception. 452 U.S. at 401-402. The *Hayes* court was wrong to create an exception to *res judicata* and is contrary to precedent barring a second exclusive federal action following plaintiff's voluntary litigation of its dispute to final judgment in state court. *Nash County Board of Education* v. *Biltmore Company*, 640 F.2d 484, (4th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981); *Connelly* v. *Balkwill*, 174 F.Supp. 49 (D.C. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960); *Kaufman* v. *Shoenberg*, 154 F. Supp. 64 (D.C. Del. 1954); *Fowler Manufacturing Company* v. *Gorlick*, 415 F.2d 1248, 1255 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 24 L.Ed.2d 503 (1970); *Derish* v. *San Mateo-Burlingame Board of Realtors*, 724 F.2d 1347 (9th Cir. 1983).

The illustration cited in support of §26 of the *Restatement (Second) of Judgments* (1982) is directly contrary to existing law. (Compare illustration cited at page 24 of Petitioners' brief with the cases indicated above.) Moreover, none of the authority used to back up the *Restatement's* illustration actually supports it. The Reporter's Note to §26, comment c(1) cites *Cream Top Creamery* v. *Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967) and *International Railways of Central America* v. *United Fruit Co.*, 373 F.2d 406 (2nd Cir. 1967), *cert. denied*, 387 U.S. 921 (1967), *reh. denied*, 389 U.S. 1059 (1968) as precedent. As previously noted, *Cream Top* never decided the issue but merely questioned the application of *res judicata* to an exclusive federal claim in *dictum*. The court's pronouncements in

International Railways were also *dicta* since the statute of limitations precluded the federal antitrust action, except for those violations which continued after the original suit: "We find it unnecessary to decide this, however, since our ruling as to the statute of limitations brings the case to us in a posture, generally limited to damages suffered after February 16, 1961, quite different from that in which the issue was considered by the district judge." 373 F.2d at 418, 419.

The other cases relied on in the *Restatement* do not involve the situation where a plaintiff elects a state forum first, loses in a final judgment and thereafter sues in federal court. Instead, they involve concurrent state and federal suits and must decide whether to stay the federal action. *See Klein* v. *Walston & Co.*, 432 F.2d 936, *per curiam*, (2nd Cir. 1970), which held that a 10(b)(5) securities fraud federal action should be stayed pending resolution of a pending state lawsuit. It noted that state courts cannot hear 10(b)(5) claims but did not discuss claim preclusion. Also, *see Abramson* v. *Pennwood Investment Corp.*, 392 F.2d 759, 760, 762 (1968) where the federal 10(b) claim was filed one year prior to the state court suit. Plaintiff's motion to intervene was denied so discussion that a settlement in the subsequent state court suit could not preclude the earlier filed federal claim was *dicta* also. The district court cases cited by the *Restatement* also involved concurrently filed federal and state suits dealing with stay issues. *Wellington Computer Graphics, Inc.* v. *Modell*, 315 F. Supp. 24, 25 (S.D. N.Y. 1970) and *Kahan* v. *Rosenstiel*, 285 F. Supp. 61, 63 (D. Del. 1968).

Consequently, the *Restatement* illustration to §26 is a misstatement of the law. None of the authority which is supposed to support it actually allowed a plaintiff to voluntarily choose the state court to litigate its claim, lose and after that final adverse judgment, sue again in federal court on an alternative exclusive federal claim. The *Restatement* also failed to discuss or cite most of the decisions existing at that time contrary to its illustration, i.e., *Nash County Board of*

Education v. *Biltmore Company*, 640 F.2d 484, (4th Cir. 1981), *cert. denied*, 454 U.S. 876 (1981); *Connelly* v. *Balkwill*, 174 F.Supp. 49 (D.C. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960); *Kaufman* v. *Shoenberg*, 154 F. Supp. 64 (D.C. Del. 1954); *Fowler Manufacturing Company* v. *Gorlick*, 415 F.2d 1248, 1255 (5th Cir. 1969), *cert. denied*, 396 U.S. 1012, 24 L.Ed.2d 503 (1970). The illustration is also inconsistent with other comments in the *Restatement* such as that found in §24 comment g:

> The plaintiff, having voluntarily brought his action in a court which can grant him only limited relief, cannot insist upon maintaining another action on the claim.

Restatement, Second, Judgments at 204. No reason exists to limit this rule to actions brought within the jurisdiction of a particular state as opposed to successive state and federal lawsuits based on the same cause of action.

Most important, neither §26 of the *Restatement* nor its "authority" mention or confront the full faith and credit obligation under §1738. It is simply ignored, contrary to petitioners' assertions that the illustration to §26 establishes that the Sherman and Clayton Acts partially repealed §1738. (Pet. Br. at 23-24)

Section 86 of the *Restatement* (quoted in Pet. Br. at 23) does attempt to deal with section 1738. Comment b to that section notes:

> First, although the effect of state adjudication in subsequent federal litigation has been an important legal issue since the adoption of the Constitution, only recently has the intricacy of the problem begun to be worked out in the decisions. In particular is this true of the significance of actions founded on 42 U.S.C. §1983, which often entail consideration of an adjudication by a state tribunal. The law on the problem is thus very much in an early state of development, and cannot usefully be restated in more precise terms.

* * * * *

Usually, the state court judgment is conclusive without qualification. Where the state tribunal was not utterly lacking in authority to determine the matter, its judgment is entitled to some weight in any case. However, given the variousness of federal policies, it is impossible to frame generalizations as to the weight that a state adjudication should have in the face of an arguably overriding federal concern.

* * * * *

Whether a scheme of federal remedies implies an exception to 28 U.S.C. §1738 in any particular case is a matter of statutory interpretation. However, the intention of Congress to make such an exception should not be readily inferred. The values underlying the rule of finality are, generally speaking, no less when the judgment is that of a state court challenged in federal court than in any other context of recognition. Furthermore, whenever a state court judgment is refused an effect with which it would otherwise be endowed, some stress is imposed on the relations of mutual respect that properly characterize the federal legal system.

Restatement of Judgments, Second, at pp. 306–307.

As emphasized in this comment, a broad and general rule that excepts all federal claims or interests from the reach of §1738 does not exist. Nor should one be created in view of the tension which would result between states and the federal system. Indeed, this Court has made it clear that no exception is to be created for a federal remedy unless the statute providing for that remedy contains an "express or implied partial repeal" of §1738. *Kremer*, 456 U.S. at 468; *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980).

Petitioners argue that all exclusive federal remedies should be construed to create an implied repeal of §1738, notwithstanding the absence of an express congressional

intent to do so. Such a repeal would encourage plaintiffs to file in the state court first, wait for the result, and if disliked, pursue the federal remedy. Moreover, all lawsuits, with existing final state court judgments, could be revived in federal court any time a new federal exclusive remedy is created by Congress, as long as the statute of limitations is satisfied. The expansive judicial exception to §1738 urged by petitioners would work a cataclysmic effect on the finality of state court judgments. No party could be sure that a dispute in state court is finally resolved as long as exclusive federal claims are removed from the reach of full faith and credit.

The facts of this case demonstrate why a blanket immunity from §1738 for all exclusive federal claims should not be created. As long as petitioners were not coerced into bringing this cause of action in a particular forum, they waived any privilege to assert the federal antitrust theory if not initiated prior to the final judgment in state court. Such a waiver no more inhibits federal antitrust enforcement than those situations in which the antitrust claim is barred by a prior federal court action. *Federated Department Stores* v. *Moitie*, 452 U.S. 394 (1981); *Norman Tobacco & Candy Company* v. *Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961); *Martino* v. *McDonald's System, Inc.*, 598 F.2d 1079 (7th Cir. 1979) *cert. denied*, 444 U.S. 966 (1979). The policies of antitrust enforcement do not prevail over the strong interest in preserving the finality of judgments and conserving judicial resources when, as here, a plaintiff elects not to fully prosecute its federal antitrust action in a timely fashion. *Federated*, 452 U.S. at 401–402.

Petitioners cite *Lawlor* v. *National Screen Service Co.*, 349 U.S. 322 (1954) as support for ignoring regular claim preclusion principles when a second suit alleges federal antitrust violations. *Lawlor* held that the preclusion doctrine does not extinguish claims for antitrust violations which occurred after the initial suit was concluded. 349 U.S. at 328. That decision did not, however, hold that the regular rules of claim preclusion were not applicable to federal antitrust

actions or that such actions should receive special treatment. Moreover, antitrust violations occurring after the first judgment are not claims that could have been raised in the first lawsuit. The more recent case of *Federated Department Stores* v. *Moitie*, 452 U.S. 394 (1981) clearly establishes that federal antitrust suits are indeed subject to traditional claim preclusion rules.

Petitioners' request for a blanket immunity advances no important interest and subverts the "vital public interests" behind the doctrine of *res judicata* and §1738. *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 401–402 (1981); *See* also *Migra* v. *Warren City School District Board of Education*, U.S. , 79 L.Ed.2d 96, 104 S.Ct. 892 (1984) where this Court held that it was more important to accord full faith and credit to a state court judgment than "to ensure separate forums for federal and state claims," 79 L.Ed.2d at 64.

In view of the importance of preserving the finality of state court judgments under §1738, this Court held in *Allen* v. *McCurry*, 449 U.S. 90 (1980), that a criminal state court defendant who raised illegal search issues in connection with his defense is collaterally estopped on those search issues in a subsequent §1983 action in federal court. The mandate under §1738 was so strong that the fact the criminal defendant was compelled into raising those issues in the state forum was not sufficient to allow their relitigation in the chosen federal forum. It was more important to accord the state court judgment full faith and credit. Hence, *Allen* went further than is necessary in this case, since petitioners were not compelled to litigate in the state court.

Brown v. *Felsen*, 442 U.S. 127 (1979) predates the admonitions in *Allen*, *Kremer* and *Migra* regarding the importance of according full faith and credit to state court judgments. More significant, however, *Brown* is limited to special circumstances arising in the bankruptcy context which are not present here. The bankruptcy system enacted by Congress

consists of a separate court of bankruptcy judges,[5] a bankruptcy code[6] and an independent code of procedural rules employed in the bankruptcy court.[4] While some of these components have recently been amended, this entire system of special courts, codified law and procedure existed when *Brown* was considered by this Court. Arguably, this bankruptcy system could support an implied repeal of §1738, since "... the later act covers the whole subject of the earlier one and is clearly intended as a substitute ..." *Kremer*, 456 U.S. at 468. It was also stressed in *Brown* that Congress specifically provided by statute that the dischargeability of a debt was within the Bankruptcy Court's exclusive jurisdiction. *Brown*, 442 U.S. at 136.

In contrast, there are no special federal antitrust courts, judges or procedural rules. More importantly, there is no statutory declaration that antitrust jurisdiction is exclusively confined to the federal courts (App. to Joint Pet. A-4, A-5). Since there is no manifest Congressional intention to partially repeal §1738 by adding the Sherman and Clayton act remedies, the prior state court judgment cannot be stripped of its finality. *Kremer*, 456 U.S. at 468, quoting *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976). *See* also Currie, "Res Judicata: The Neglected Defense," 45 U. Chi.L.Rev. 317, 328 (1978), quoted by *Allen* for the proposition that concluding that "the creation of a federal cause of action by itself does away with the rules of preclusion would take away almost all meaning from §1738." *Allen* v. *McCurry*, 449 U.S. at 98, n. 11.

It was also emphasized in *Brown* that the prior state court proceeding, which resulted in a money judgment for the creditor against the debtor, was not threatened by the proceeding to determine dischargeability of that debt in the

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[5] "The Bankruptcy Amendments and Federal Judgeship Act of 1984." Public Law 98-383, effective July 10, 1984.

[6] 11 U.S.C. 101 et seq.

[4] 28 U.S.C. 2075 et seq.

bankruptcy court. Since the debtor subsequently filed bankruptcy, the dischargeability action was necessary to enforce the creditor's judgment against the debtor. 442 U.S. at 133. The interests of *res judicata*, the Court noted, would therefore not be served by precluding the dischargeability proceeding. 442 U.S. at 132.

In contrast, permitting the instant suit to proceed could create a result inconsistent with the state court judgment. The state courts dismissed petitioners' actions on the basis that membership in the Academy was not an "economic necessity" and such a dispute was therefore not subject to judicial review. *Trister* v. *American Academy of Orthopaedic Surgeons*, 78 Ill. App. 3d 746, 755, 396 N.E.2d 1225, 1231 (1979). Allowing petitioners to proceed in this antitrust suit is patently inconsistent with the state holding that the membership dispute was not justiciable and may yield inconsistent results regarding the "economic necessity" of Academy membership.

Because the debtor in *Brown* had not filed for bankruptcy until after the state court debt collection judgment, there were no facts or events which would give the creditor a right or reason to litigate the dischargeability question during the debt collection proceeding. To require the dischargeability claim to be litigated in a state court, before a bankruptcy is filed, would be an "advisory adjudication." 442 U.S. at 135. This situation can be contrasted with the instant suit where no new facts intervened between the start of petitioners' state suits and this one filed four years later. Both were premised on the Academy's failure to elect them to membership. The only new fact that developed was petitioners' defeat in the state court.

Furthermore, the effect of barring the dischargeability claim in *Brown* would coerce parties to litigate all dischargeability or other bankruptcy issues in the state court. Since a state judgment for a debt usually precedes most bankruptcies, this would frustrate Congress' clear intent to have this issue decided by the bankruptcy courts. This court was

cognizant of that factor in its ruling in *Brown*, refusing to force adjudication of all bankruptcy issues in state courts. 442 U.S. at 139. An exception to §1738, however, is not warranted in this case where the effect of precluding this action does not coerce parties to litigate all federal antitrust claims in state court.

The issue of coercion also distinguishes this case from *Haring* v. *Prosise*, U.S. , 76 L. Ed. 2d 595, 103 S. Ct. 2368 (1983). In *Haring*, collateral estoppel was not applied to a §1983 action brought in federal court by a plaintiff who pled guilty to criminal violations arising out of the same circumstances in a previous state criminal action. The §1983 issues were not "actually litigated" in the prior criminal proceeding and it was, therefore, inappropriate to preclude them. Also, this court was concerned that applying collateral estoppel or issue preclusion in such a situation would have the same effect as in *Brown* i.e., compel resolution of federal issues in state court:

> Defendants who have pleaded guilty and who wish to bring a §1983 claim would be forced to bring that claim in state court, if at all.

76 L. Ed. at 610.

Haring does not apply to this case where there was no compulsion. Furthermore, its requirement of "actual litigation" related to issue preclusion, as opposed to claim preclusion.

The spectre of coercion also may have prompted Justice Brennan to comment, while dissenting in *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 674 (1978), that he doubted if state court judgments could preclude exclusively federal claims. In *Will*, a state court defendant filed a federal action for 10(b)(5) violations while the prior state court suit was pending. Unlike this case, there was a reversal of parties. Under those circumstances, the prospect that the federal plaintiff's claim might be barred by the prior state court judgment is more discomforting, since this forces the federal plaintiff to

involuntarily forego the federal claims. The situation is entirely different when a litigant voluntarily waives its right to pursue a federal claim.

Thomas v. *Washington Gas Light Company*, 448 U.S. 261 (1980) also fails to support an implied repeal of §1738 for all suits premised on a legal theory not within the jurisdiction of the first forum. *Thomas* dealt with whether a workmen's compensation award in Virginia could bar a supplemental award in the District of Columbia. The District of Columbia administrative law judge held that §1738 required application of Virginia claim preclusion principles. Application of the principles led to the judge's finding that the Virginia award was not a bar to further recovery in Virginia. Accordingly, under §1738 there was no bar to a supplemental action in the District of Columbia. 448 U.S. at 265, n. 6 and 266. In *Thomas*, there was no final judgment in the prior state action, unlike this case.

Also, the plurality opinion in *Thomas* noted that a supplemental award would not threaten the integrity of the prior judgment, since the second award would credit the amount given in the first case. The two state awards were not inconsistent or mutually exclusive. 448 U.S. at 281. On the other hand, permitting the instant case to proceed and inquire into reasons for petitioners' exclusion from the Academy is directly contrary to the prior state court's judgment that the Academy's membership deliberations are not subject to judicial review.

The mandate of §1738 is much stronger when the second suit threatens a result wholly contrary to the first. The fact that *Thomas* and *Brown* involved subsequent actions which did not endanger the prior state court judgments lessened the need to strictly apply §1738. 448 U.S. at 284.

The plurality in *Thomas* was also concerned that the injured workman had not been in a proper state of mind to freely select the initial forum. 448 U.S. at 284, n. 31. The concurring judges specifically commented that it would be

unfair not to accord full faith and credit if a party, as here, freely selected the first forum, became dissatisfied with that judgment and shopped for a new jurisdiction to reconsider the matter. 448 U.S. at 288-289.

The fact that the compensation award in *Thomas* was entered by an administrative tribunal, as opposed to a court of general jurisdiction, was also significant. The plurality stressed that a workmen's compensation tribunal does not "... stand on the same footing as court judgments ..." 448 U.S. at 281-282. It then held that full faith and credit need not be accorded to such an administrative determination, in contrast to a judgment by a state court of general jurisdiction. 448 U.S. at 282, 283. That ruling is consistent with this court's recent pronouncement in *McDonald* v. *City of West Branch, Michigan*, ___ U.S. ___, 80 L.Ed.2d 302, 104 S.Ct. 1799 (1984) that §1738's reach is limited to "judicial proceedings."

Because the prior award in *Thomas* was not rendered by a court of "general jurisdiction," §1738 was not applied. This is the context in which the plurality noted that "...full faith and credit need not be given to determinations that it (Virginia Workmen's Compensation Commission) had no power to make." *See* excerpted quote in Pet. Br. at 34. The judgment of a Virginia state court, a court of general jurisdiction, would, however, be accorded full faith and credit. Unlike *Thomas*, this case deals with a prior final state court judgment which had general jurisdiction of the parties and the subject matter. Consequently, that judgment should be afforded full faith and credit.

The application of §1738 to this case does not violate petitioners' constitutional rights. Their failure to foresee or consider that a second action against the Academy would be barred after a final state court judgment does not erase the fact that petitioners had their "day in court" in the first action. All of their theories "could have been raised" prior to that final judgment by either filing a federal court action and joining the state claims or instituting federal and state actions, concurrently, preserving access to both forums. *See*

Migra v. *Warren City School District Board of Education*, U.S. , 79 L. Ed.2d 96 at 64, n. 7 (1984) where this court noted that a plaintiff can preserve access to the federal forum if the federal suit is filed before or concurrently with the state action *and* the state court is informed that plaintiff intends to return to federal court to litigate its federal claims.

The principles applied to preclude this action are not new. Several cases have barred second actions premised on exclusive federal claims because of prior state court judgments. These decisions existed when petitioners elected to proceed in state court, including opinions from the Court of Appeals for the sixth and ninth circuits. *Connelly* v. *Balkwill*, 174 F. Supp. 49 (D.C. Ohio 1959), *aff'd*, 279 F.2d 685 (6th Cir. 1960); *Frazier Manufacturing Company* v. *Gerlick*, 415 F.2d 1248, 1255 (9th Cir. 1969), *cert. den.*, 396 U.S. 1012, 24 L.Ed.2d 503 (1970); *Kaufman* v. *Shoenberg*, 154 F. Supp. 64 (D.C. Del. 1954); *Nash County Board of Education* v. *Biltmore Company*, 464 F. Supp. 1037 (1978), *aff'd*, 640 F.2d 484 (4th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981); and *Key* v. *Wise*, 629 F.2d 1049 (5th Cir. 1980), *cert. den.*, 454 U.S. 1103 (1981). Moreover, Professor Moore approved of such a result in his treatise on *res judicata* when, as here, there was no reversal of parties in the two suits. 1B *Moore's Federal Practice*, Par. 0.410[2] at pp. 364–365.

Yet, petitioners argue that since the *general* effect of *res judicata* bars any theories which "could have been raised," and since they could not raise their federal antitrust theories in the state court, this action is not barred. The federal cases cited in support of petitioners' position are not applicable in light of §1738's command that the Illinois judgments be given the same effect they have in Illinois. However, even if the cases were relevant, they have been misconstrued by petitioners.

The "could have been raised" phrase is used to distinguish the effect of *res judicata* from collateral estoppel. Collateral estoppel is applied only if an issue was actually raised and

litigated while *res judicata* also applies to any matter which might have been raised. Petitioners present no justification for their argument that the first forum must have jurisdiction of the legal theory brought in the second action before the first forum's judgment will be afforded full faith and credit. It is only required that the first forum have general jurisdiction of the parties and the subject matter so that a valid and final judgment is entered by that forum. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 348–349 (1942). This is exactly what is meant by those older cases cited by petitioners which apply *res judicata* to courts of "concurrent jurisdiction." (Ptr. Br. at 33). The "concurrent" refers to parties and subject matter, not legal theories. *See* for example petitioners' authority, *The Johnson Co.* v. *Wharton*, 152 U.S. 252 (1894). In *Johnson*, this court noted that *res judicata*'s reach is not confined to courts of concurrent jurisdiction but extends to foreign judgments. 152 U.S. at 257.

Assuming for the sake of argument that this action was not filed by petitioners as an "afterthought" or an attempt to upset the state court judgment, their failure to appreciate principles of claim preclusion law does not justify affording them a second opportunity to sue the Academy. No principle of fairness or equity warrants the rejection of *res judicata*. *Federated*, 452 U.S. at 401-402. Because the principles applied to bar this case are not new, petitioners have not been denied due process.

Moreover, precluding this case does not force litigants to forego a state forum as a condition of exercising federal rights, since parties wanting access to both forums can file concurrent federal and state suits. What is prohibited, however, is launching a direct attack on a final state court judgment by filing a federal action after a state court defeat. Failure to apply §1738 to the second action would jeopardize the finality of all state court judgments without advancing any important federal interest. Indeed, federal antitrust enforcement is enhanced by encouraging parties to bring their claims immediately forward.

III. THIS ACTION IS BARRED UNDER FEDERAL CLAIM PRECLUSION LAW.

Even if §1738 did not govern the facts of this case, federal principles of *res judicata* would still preclude this action. Those principles are comparable to Illinois law and application of either federal or Illinois rules would compel the same result in this suit. *See* concurring opinion of *Judge Flaum*. (App. to Joint Pet. A26-A30)

"Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana* v. *United States*, 440 U.S. 147, 153 (1979).

The essential elements of *res judicata* are (1) a final judgment on the merits in an earlier suit; (2) an identity of the cause of action in both the earlier and the later suit; and, (3) an identity of parties or their privies in the two suits. *Nash County Board of Education* v. *Biltmore Co.*, 640 F.2d 484, 486 (4th Cir. 1981), *cert. den.*, 454 U.S. 878 (1981); *Lee* v. *City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982) The first and third elements are undisputably present in this case.

The federal test for determining if two suits are premised on the same cause of action for purposes of *res judicata*, is whether both causes arise out of the same basic factual situation. *Himel* v. *Continental Ill. Nat. Bank & Trust*, 596 F.2d 205 (7th Cir. 1979); *Lambert* v. *Conrad*, 536 F.2d 1183 (7th Cir. 1976). That test is satisfied here because the state court complaints and the amended complaint here allege the same facts and seek redress for the same alleged wrong—exclusion from the Academy.

As in Illinois, a change in theory does not rejuvenate a rejected cause of action, and *res judicata* will bar the second suit. In *Norman Tobacco & Candy Company* v. *Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961), plaintiff's initial suit charged Gillette with a breach of contract by refusing to permit plaintiff to purchase products from Gillette directly; Gillette won. The plaintiff then filed another action alleging

a federal antitrust violation for Gillette's refusal to deal with the plaintiff. In the second action, the Fifth Circuit applied the "operative fact" test and held that there was only one breach and plaintiff had had its day in court and lost. It could not litigate the same wrong again.

Green v. *American Broadcasting Company*, 572 F.2d 628 (8th Cir. 1978) is the converse of *Norman Tobacco*. Plaintiff first filed an antitrust action and subsequently brought a breach of contract suit. The courtheld that both actions were identical for res judicata purposes since the two claims arose from the same set of facts.

Martino v. *McDonald's System, Inc.*, 598 F.2d 1079 (7th Cir. 1979), *cert. den.*, 444 U.S. 966 (1979), is also consistent with *Norman Tobacco* and *Green*. Martino's antitrust claim was barred because of his failure to assert it as a compulsory counterclaim in McDonald's earlier suit for breach of a franchise agreement.

These decisions show that petitioners' state court suits sought relief for the same alleged injury, caused by the same purported wrongs, as are presented here. They cannot deny this case is based on the same events as their unsuccessful state court suits when the factual allegations in the complaint at bar track those in the state court complaints, word for word. A more compelling case for the application of *res judicata* could not be found.

Petitioners rely on *Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2nd Cir. 1955) to preclude the application of *res judicata*. Westinghouse sued Lyons in state court demanding an accounting for a breach of contract. In response Lyons charged Westinghouse with violating the state antitrust laws. Lyons then sued Westinghouse in federal court, charging Westinghouse with various federal antitrust violations. The issue in *Lyons* was whether the federal action should be stayed.

In discussing *res judicata*, the Second Circuit adopted a balancing approach based on public policy:

> In short, it appears to us that the doctrine [of *res judicata*] like so many others in the law, must be treated as a compromise between two conflicting interests: the convenience of avoiding a multiplicity of suits and the *adequacy of the remedies* afforded for conceded wrongs.

222 F.2d at 169, emphasis added. At the time *Lyons* was decided, the New York antitrust statute did not provide for the recovery of treble damages. (*See* New York Consolidated Laws, Chapter 20, Article 22, legislative history of §340(5)). The court refused to apply *res judicata*, noting the federal courts' exclusive jurisdiction over treble damage actions for antitrust violations. On the other hand, Illinois antitrust laws are virtually identical to their federal counterparts. Ill. Rev. Stat., Ch. 38, §60-7 (1977), *see also Snyder* v. *Howard Johnson's Motor Lodges, Inc.*, 412 F. Supp. 724 (S.D. Ill. 1976). Thus, unlike the situation in *Lyons*, Marrese and Trimster had an opportunity to seek complete antitrust relief (i.e., treble damages and injunctive relief) in their prior state court actions. The availability of treble damages in the state action bars a second federal antitrust suit. *Derish* v. *San Mateo Burlingame Bd. of Realtors*, 724 F.2d 1347 (9th Cir. 1983); *South City Board of Education* v. *Biltmore Co.*, 660 F.2d 464 (4th Cir. 1981), *cert. den.*, 454 U.S. 879 (1981).

That an award of treble damages in Illinois might be discretionary with the trial judge in some instances does not change the fact that the Illinois courts had jurisdiction to provide treble relief.

An automatic right to relief, is not relevant in a *res judicata* context. The proper inquiry is whether an opportunity existed to seek such relief. If the first court has the power or jurisdiction to provide that relief, a second suit on the same cause of action will be barred. This principle was recently applied in *Harper Plastics* v. *Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981). In *Harper Plastics* plaintiff filed an

antitrust action in federal court which was dismissed on the merits. Subsequently, plaintiff brought a contract claim in the state court arising from the same facts as the prior antitrust claim. The contract claim had not been joined with the antitrust complaint filed in federal court. The district court enjoined the state action pursuant to the relitigation exception to the Federal Anti-Injunction statute, finding that the plaintiff had attempted to split its cause of action. Plaintiff argued on appeal to the Seventh Circuit that *res judicata* should not apply because it would be unfair to require the joinder of state theories where they could only be heard under the doctrine of pendent jurisdiction and that such jurisdiction is discretionary. The court disagreed:

> We fail to discern the unfairness in requiring a plaintiff to join all relevant theories of relief in a single proceeding. The uncertainty over whether a trial judge would exercise pendent jurisdiction does not justify permitting the institution of a multiplicity of proceedings which may have the effect of harassing defendants and wasting judicial resources. If appellant entertained any doubts at the pleading stage they should have been resolved in favor of joinder. *See, Federated Department Stores* v. *Moitie*, U.S. , 101S.Ct.2424, 69 L. Ed. 2d 103 (1981) (Blackmun, J. Concurring).

657 F.2d at 946.

This is consistent with *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), where this Court indicated that a state litigant could be barred from filing a second action in federal court alleging securities violations if similar relief could have been obtained in the state court. The fact that the securities laws were within the federal court's exclusive jurisdiction did not warrant a conclusion that the state court could not provide similar relief:

> The only other issue encompassed by the writ was Calvert's Rule 10b-5 claim for equitable relief. It is not disputed here that the state court has jurisdiction to

> ... reversal the agreement as Calvert requests. That being conceded, we find no merit in Calvert's further argument that the statutory grant of exclusive jurisdiction in any way distinguishes this aspect of the case from our earlier decisions in which both the state and federal courts had power to grant the desired relief.

457 U.S. at 666, n. 9.

Alternatively, *Nash* questioned whether an identical right to relief was a relevant factor in a *res judicata* context but did not decide the issue since, in that case, the state right to treble damages was identical to the federal right and the point was therefore moot. 640 F.2d at 492. Instead, the *Nash* court applied *res judicata* for reasons independent of the relief or "remedy" issue, just as can be done in this case. *Nash* examined in depth the reasoning of *Lyons*. 640 F.2d at 490–493. The court noted that the reasoning in *Lyons* rests on two grounds: the exclusivity of the federal remedy under the Sherman Act and the unavailability of treble damages in the state action. With respect to the first ground, *Nash* noted that cases both prior to and following *Lyons* have held that a second federal action, which is within exclusive federal jurisdiction, can be barred by collateral estoppel based on a prior state action. The court said that there was no logical reason for not holding that such an action can be barred by *res judicata*. Indeed, the Supreme Court in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982) treated the doctrines of collateral estoppel and *res judicata* in an identical fashion, noting they should be subject to the same analytical tests when a prior state court action is involved. 456 U.S. at 481–482, n. 22. *Kremer* supports the majority's decision to refrain from drawing an artificial distinction between the two doctrines, just as the fourth circuit refused to do in *Nash*.

Unlike the plaintiffs in *Lyons*, and other cases following it, petitioners had the opportunity to seek treble damage relief for antitrust violations in their state actions. The Illinois courts have jurisdiction to award treble damages for antitrust violations. The holding in *Will* v. *Calvert, Parish* and

Nash, i.e., exclusive jurisdiction does not create an exception to res judicata when similar state relief is available, is consistent with *Kremer*. Even though Kremer's subsequent federal action for employment discrimination was based on a federally created right, Title VII, a prior state court administrative proceeding that arose out of the same set of facts barred the federal lawsuit. As long as Kremer had a fair opportunity to litigate his grievance in state court, he could not bring the subsequent federal action. Significantly, the Supreme Court cited *Nash* in support of its position that the premising of a subsequent federal action on a different statute does not *per se* establish whether plaintiff had a full opportunity to litigate his grievance in the prior state court action:

> The lowers courts did not discuss whether it is the doctrine of *res judicata* or collateral estoppel that applies here. Section 1738 requires dismissal of petitioner's Title VII suit whether his Title VII claim is precluded by the New York judgment or whether he is collaterally estopped by that judgment from complaining that Chemico had discriminated against him. *Res judicata* had recently been taken to bar claims arising from the same transaction even if brought under different statutes, *Nash Co. Bd. of Educ.* v. *Biltmore Co.*, 640 F.2d 484, 488 (CA 4), cert. denied, U.S. (1981). ... It may be that petitioner would be precluded under *res judicata* from pressing a Title VII claim.

456 U.S. at 481–482, n. 22.

Nash also notes that if the plaintiff in *Lyons* had been the plaintiff in the prior state action, the commentators agree such a situation might be different. By choosing to file in state court on the same cause of action, the *Nash* plaintiff voluntarily waived the benefits (if any) of a federal forum. Both *res judicata* and collateral estoppel would be available to bar a subsequent federal suit on that cause of action, even though the federal action was within the exclusive jurisdiction of the federal court. 640 F.2d at 492–493.

As discussed in Point II of this brief, petitioners' federal cases, including *Lyons*, all present situations where the federal forum was not voluntarily waived. There was either a reversal of parties or concurrently filed state and federal actions in those cases. However, in federal cases where there was no party reversal or concurrent suits, an exclusive federal claim filed after an adverse state court judgment was barred. *See* pp. 16-21 herein.

Those cases which did confront facts similar to this action and barred the exclusive federal claim refute petitioners' "jurisdictional competency" argument, i.e., that the first forum, voluntarily selected, must have had jurisdiction of the legal theory brought in the second forum. Indeed, the *Restatement* implicitly rejects such a requirement when it notes that a plaintiff who voluntarily selects a court of limited jurisdiction cannot maintain a later suit in another court which had jurisdiction to grant more or different relief from the first. §24, *Restatement of Judgment, Second*, comment g. Also, as noted earlier in Point II, the older cases' discussion of the "concurrent jurisdiction" referred to the requirement that *res judicata* applies when each court had jurisdiction of the same parties and subject matter, as opposed to jurisdiction over a particular legal theory. *See* p. 33 herein.

Petitioners have failed to advance any worthy reason or acceptable policy for their position that the first forum must have jurisdiction over the particular remedy sought in the second forum, in addition to general jurisdiction over the subject matter. In contrast, the imposition of such a requirement leaves the finality of court judgments in the hands of legislatures and subjects defendants, such as the Academy, to repetitive and vexatious suits. Moreover, it encourages plaintiffs to litigate their disputes in a piecemeal fashion, trying each in succession until the desired result is reached. This is an unnecessary burden on the courts as well as defendants.

Under either federal or Illinois principles of claim preclusion, the Seventh Circuit reached the proper result when it held that this action was barred.

CONCLUSION

It is respectfully requested that the judgment of the Circuit Court of Appeals for the Seventh Circuit reversing the order denying the respondent's motion to dismiss the petitioners' antitrust suit with directions to grant the motion and dismiss the complaint with prejudice be affirmed.

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SUPPLEMENTAL

BRIEF

No. 83-1452

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OCTOBER TERM, 1983

R. ANTHONY MARRESE and MICHAEL R. TREISTER,
Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,
Respondent.

SUPPLEMENTAL BRIEF OF JOINT PETITIONERS

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SUPPLEMENTAL BRIEF OF JOINT PETITIONERS

Pursuant to Rule 35.5 of the Rules of Practice of this Court, petitioners, R. Anthony Marrese, M.D., and Michael R. Treister, M.D., hereby respectfully cite and discuss the August 31, 1984, decision of the Seventh Circuit in *Roland Machinery Company v. Dresser Industries, Inc.* in support of their contention that this Court should reverse the Seventh Circuit's criminal contempt decision as well as its claim preclusion decision in the case here reviewed. *Roland Machinery Company* is reported at 47 Antitrust & Trade Reg. Rep. (BNA) No. 1181, at 489-501 (August 31, 1984), and Trade Reg. Rep. (CCH) ¶ 66,175 (August 31, 1984). The petitioners' principal brief on the merits herein (the "Principal Brief") was filed on August 9, 1984. For the convenience of this Court, forty copies of the Bureau of National Affairs' report of this important new decision have been lodged with the Office of the Clerk.

The majority opinion of Judges Posner and Bauer in *Roland Machinery Company* not only proves beyond doubt that Judge Bauer's limited concurrence in the "result," but not the reasoning, of the Seventh Circuit's January 3, 1984, decision of this case was based entirely upon the holding of claim preclusion (see pages 7, 9 and 49 of the Principal Brief); it also proves that, if the Seventh Circuit had not ordered the dismissal of the underlying action, Judge Bauer (and, therefore, a

majority of the in banc circuit court) would have voted to affirm the district court's judgment of criminal contempt. Moreover, even the Plurality Opinion's additional remarks concerning the First Amendment and the supposed necessity of various alternative refinements of the protective order that was entered must now be viewed as *plain error that has been retracted by the author of those remarks.* Even if Judge Bauer's vote had not been decisive of the 5-4 outcome of both the criminal contempt and claim preclusion appeals, this frank acknowledgment of error by Judge Posner, coupled with the Plurality Opinion's express holding that the criminal contempt "fell with the case," would require *at least* the vacating and remand of the decision of the criminal contempt appeal, with instructions, if the decision of the claim preclusion appeal is reversed.

The controlling aspect of *Roland Machinery Company* for this case is the majority's discussion of the scope of appellate review of discretionary trial court orders, beginning at page 493 of the above-mentioned report. There, Judges Posner and Bauer note that:

> "When we speak of an issue as being committed to the district court's discretion, intending to imply by this that *the scope of appellate review should be extremely limited*, we generally have reference to one of three different (but closely related, and sometimes identical) types of issue: one not decided according to a standard; one not susceptible of uniform treatment across cases; one not decided on the basis of evidence reasonably accessible to the appellate court through the record of the proceedings in the trial court. See *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610,615 (7th Cir. 1983) (en banc); *United States v. McCoy*, 517 F.2d 41,44 (7th Cir. 1975); *United States v. Criden*, 648 F.2d 814, 817-18 (3d Cir. 1981); *Noonan v. Cunard S.S. Co.*, 375 F.2d 69, 71 (2d Cir. 1967) (Friendly, J.). Criminal sentences, *rulings on most discovery questions*, and rulings on evidentiary questions where the issue is prejudicial impact on the jury *illustrate the three types of discretionary judgment.* Their common characteristic is that either the need for or the feasibility of appellate review is very limited. . . . *All are determinations where appellate review is limited to deciding whether the district judge abused his discretion.*"
>
> (id.) (emphasis supplied)

Judges Posner and Bauer then proceed to distinguish between the "extremely limited" scope of review of such inherently discretionary determinations and the far broader scope of review of a trial court's determination to grant or deny a preliminary injunction. They hold that a "clear error" or "firm conviction of error" standard of review is the *narrowest* that can be appropriate for preliminary injunctions and that this standard can only be described as one of "abuse of discretion" in a vague (and confusing) sense of that term (page 494). On the other hand, in the case of an inherently discretionary ruling, "abuse of discretion" must be understood and applied in the "strong sense." Discretion, in that sense, can only be "abused" when

> "'. . . the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court.' [citation omitted] See also *Deitchman* v. *Herbst*, Nos. 83-1758 et al., slip op. at 13-14 (7th Cir. July 26, 1984); *Harrington* v. *DeVito*, 656 F.2d 264, 269 (7th Cir. 1981). *This may be the appropriate formula when reviewing a determination as to whether a discovery order should have been granted, or whether an objection to a question asked a witness should have been sustained as unduly prejudicing a party in the eyes of the jury.* But it is not the appropriate formula for reviewing orders granting or denying preliminary injunctions."
>
> (id.) (emphasis supplied)

Former Chief Judge Swygert's dissent to this opinion does not take issue with the "extreme limitation on the scope of appellate review" that results from the application of the "no reasonable person could agree" standard to inherently discretionary rulings (see page 499 and authorities there cited). Rather, while acknowledging that the Seventh Circuit has unquestionably adopted this standard for such rulings and that

rulings on motions for preliminary injunctions may well call for more searching review (id.), he concludes that the appellate court must still not reverse the grant or denial of a preliminary injunction on the basis of mere "second guess[es] [about] the balances struck by the district court" (id.).

Given Judge Bauer's express opinion in *Roland Machinery Company* that at least "most" discovery rulings are of an inherently discretionary nature, the conclusion is inescapable that he would have affirmed District Judge Shadur's discovery order and criminal contempt judgment in the present case if he had not concurred in the result of claim preclusion. Surely, the issue of whether to include one or more additional, alternative protections in an already strict protective order—protections which the respondent never asked for because it did not want them and admittedly would have refused the required production even if they had been included (App. A-39, 41)—is not *less* discretionary than the issues involved in most other discovery rulings. The "standard" imposed upon the district court by FRCP 26(c) is, simply, whatever "justice requires" for the protection of any party from any "annoyance, embarrassment, oppression or undue burden or expense" of discovery, "*upon motion and for good cause shown*" (emphasis supplied). The extent of the discretion involved in shaping the fine details of a protective order ("upon motion") is emphasized by the provision that the district court "may" in the requisite circumstances *issue* such an order. Furthermore, the wording of FRCP 26(d) strongly suggests that a district court has even broader discretion not to bifurcate or otherwise segment discovery than it does not to issue a protective order of any other kind.

The logical impossibility of holding that such "managerial rather than juristic judgments" (*Roland Machinery Company*, page 493) are not discretionary also compels the rejection of the Plurality Opinion's wholly unprecedented and unnecessary remarks about the supposed unique First Amendment "interests" of professional associations. District Judge Shadur may or

may not have committed a "mistake" in failing to include additional protections in his protective order so as to protect those "interests" still better than he did—although the respondent clearly did not desire those protections. However, he surely did not thereby act as no reasonable man could have approved. Former Justice Potter Stewart and four members of the nine-judge in banc tribunal that eventually reviewed Judge Shadur's order approved it. Thus, with Judge Posner's present retraction of his erroneous "firm conviction of mistake" approach in the Plurality Opinion (see Part V of the petitioners' reply brief in support of their petition for certiorari), the First Amendment issue in the criminal contempt case simply disappears.

Only if that constitutional issue remains could a vacating and remand of the Seventh Circuit's criminal contempt decision, instead of an outright reversal, possibly be warranted—and even then only because it would be an inappropriate for this Court to render an unnecessary constitutional opinion as it was for the Seventh Circuit. Yet, Judge Bauer was obviously unimpressed by the plurality's novel First Amendment analysis and said nothing in favor of it. Therefore, due to the logical relationship of his opinion in *Roland Machinery Company* to his decisive concurring opinion in the case here reviewed, the reversal by this Court of both the interrelated criminal contempt and claim preclusion aspects of this case is required if this important federal antitrust action is to be allowed to continue.

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REPLY

BRIEF

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R. ANTHONY MARRESE and MICHAEL R. TREISTER,
Petitioners,

v.

AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS,
Respondent.

REPLY BRIEF OF JOINT PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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Respondent.

REPLY BRIEF OF JOINT PETITIONERS

SUMMARY OF ARGUMENT

The petitioners first make clear the respondent's concession of the Seventh Circuit's multiple errors with respect to the First Question Presented. The respondent does not respond to their initial contention that, since the federal courts may not accord state court judgments greater preclusive effect than would the courts of the judgment-rendering state,[1] it was illogical for the Plurality Opinion to treat exclusively federal claims as especially subject to such greater preclusion. The respondent does not even attempt the impossible task of showing that, although the most important federal civil rights statutes cannot create an implied exception to 28 U.S.C. § 1738 so as to allow such

[1] *Migra v. Warren City School Dist. Bd. of Ed.*, ___ U.S. ___, 79 L. Ed.2d 56, 104 S.Ct. 892 (1984); *Board of Pub. Works v. Columbia College*, 84 U.S. 521 (1873); *Hague v. City of Evanston*, 729 F.2d 510 (1984).

federal claims when they would be precluded by the application of state preclusion rules. Judge Flaum's admittedly unprecedented theory of "waiver" can create such an exception so as to *disallow exclusively federal claims* when they would otherwise be free from preclusion under those same rules.[5] The respondent is unable to defend in any manner the Seventh Circuit's holding that 28 U.S.C. § 1738, the Full Faith and Credit Statute, is "inapplicable" to exclusively federal claims. Thus, the respondent has discreetly assumed the applicability of that statute, in the hope of diverting this Court's attention from what the Seventh Circuit actually held.

The respondent asserts that full faith and credit requires that this exclusively federal antitrust claim must be precluded by the previous Illinois court judgments against the petitioners if those judgments would preclude them from bringing another Illinois court action against the respondent based upon the same overall set of facts. The petitioners show, however, that this claim may only be precluded if the principles of Illinois' preclusion law *as applied to it*, not to some different, hypothetical state court claim, would require such preclusion. The respondent's approach to this second initial point distorts this Court's decision in *Kremer*, supra, and illogically assumes that the factor of exclusive federal jurisdiction has no significance.

The petitioners next demonstrate the illogic of the respondent's purported discovery that the traditional "could have been raised" requirement of Illinois' claim preclusion law has actually always meant, in cases such as this one, "could have been raised *somewhere else*, outside of the courts of Illinois." Two other basic principles of Illinois' preclusion law that prohibit the preclusion of this exclusively federal antitrust action are also briefly considered.

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[5] *Marrese v. Preston*, ____ U.S. ____, 76 L. Ed.2d 195, 103 S.Ct. 1368 (1983); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

Having proven these errors of the Seventh Circuit in failing to apply the rule of *Kremer*, the petitioners disprove the respondent's principal remaining contention, which is that no exception to the Full Faith and Credit Statute may be made so as to allow the present exclusively federal claim (on the assumption that the according of full faith and credit to the Illinois court judgments would require its preclusion) due to the petitioners' supposed "waiver" of the federal forum. First, the absence of any precedent for such a "waiver" of exclusively federal claims by the prior litigation of state law claims in state court confirms that this radical theory has nothing to do with the sound, accepted doctrine of claim preclusion. Nash[6] merely suggested such an additional possibility in the context of its holding that the previous state antitrust action and subsequent federal antitrust action there concerned were identical, and neither *Daniels*[7] nor the Plurality Opinion even so much as referred to that suggestion. No such sweeping, supposedly "equitable" revision of the "accepted principles of res judicata" can possibly be consistent with this Court's decision in *Federated Department Stores v. Moitie*, 452 U.S. 394, 398-99 (1981). Second, overpowering comity, federalism and other arguments oppose the compulsion of plaintiffs with both state law and exclusively federal claims to bring their state law claims in federal court. The respondent's attempt to respond to those arguments by adopting Judge Flaum's admittedly novel suggestion of parallel concurrent state and federal actions, while adding its own unique version of a "reservation of rights," merely confirms the necessity of adhering to the "accepted principles of res judicata" as these have been gradually evolved by the common law over centuries.

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[6] *Nash Cty. Bd. of Ed. v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981), cert. denied, 454 U.S. 878 (1981).

[7] *Daniels v. Sea Island-Burlingame Bd. of Realtors*, 724 F.2d 1347 (9th Cir. 1983).

The next-to-last section of this brief emphasizes the significance of the respondent's virtual concession of the correctness of the petitioners' analysis of the comparative state and federal antitrust standards of liability and damages remedies. Even if an automatic federal rule of nonpreclusion were inappropriate in the *Nash/Derish* situation, it would surely be appropriate when no state antitrust action has in fact been brought and when, even if one had, it would necessarily have been judged under more limited standards of liability and damages than apply to the actual federal antitrust action.

Last, the petitioners emphasize the respondent's failure to respond to their fifth argument, as presented at page 49 of their principal brief on the merits (hereinafter, the "Principal Brief") and further developed in their supplemental brief concerning *Roland Machinery Company*.[5] For the reasons there set forth, both of the Seventh Circuit's consolidated 5-4 decisions in the case here reviewed must be reversed.

ARGUMENT

I. THE RESPONDENT CONCEDES THE APPLICABILITY OF THE FULL FAITH AND CREDIT STATUTE BUT CANNOT CONCEAL THE SEVENTH CIRCUIT'S HOLDING THAT THE STATUTE "CANNOT BE USED TO DECIDE THIS CASE."

The respondent's latest attempt to justify the Seventh Circuit's decision to dismiss this case begins, as before, with the argument that "THIS ACTION IS BARRED BY THE FULL FAITH AND CREDIT STATUTE" (Respondent's Brief, p. 4). Yet, the Plurality Opinion of the Seventh Circuit held that "Section 1738 cannot be used to decide this case" (App. A-7),[6] and thus refused to consider or apply Illinois' claim preclusion law.

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[5] *Roland Machinery Company* v. *Dresser Industries, Inc.*, 47 Antitrust & Trade Reg. Rep. (BNA) No. 1181, at 489-501 (August 31, 1984); Trade Reg. Rep. (CCH) ¶ 66,175 (August 31, 1984).

[6] As in the Principal Brief, all references herein to the "Appendix" are to the originally filed Appendix to the Joint Petition for a Writ of Certiorari as it has been incorporated in the Joint Appendix.

Obviously, the respondent concedes that this holding was in error. Thus, for example, although the respondent relies heavily upon Judge Flaum's novel "waiver" theory throughout its brief, that theory is there advanced as the principal argument *against* an implied exception to section 1738 for exclusively federal claims (Respondent's Brief, pp. 15-33). Because the respondent has nowhere attempted to argue that the "waiver" theory creates a special federal rule of preclusion that *overrides* the full faith and credit requirement, no further reply on this point is necessary.

II. THE RESPONDENT'S THEORY THAT THE FULL FAITH AND CREDIT STATUTE REQUIRES THE PRECLUSION OF AN EXCLUSIVELY FEDERAL CLAIM WHENEVER A PREVIOUS STATE COURT JUDGMENT WOULD PRECLUDE ANOTHER STATE COURT CLAIM ATTRIBUTES NO SIGNIFICANCE TO THE ESSENTIAL FACTOR OF EXCLUSIVE FEDERAL JURISDICTION.

The respondent seeks to draw support from *Kremer*, supra, and *Thomas* v. *Washington Gas Light Company*, 448 U.S. 261 (1980), for its contention that, far from rendering the Full Faith and Credit Statute "inapplicable" as held by the Seventh Circuit, the factor of exclusive federal jurisdiction *has no significance at all for claim preclusion purposes*. However, neither decision even remotely supports such an illogical proposition.

First, the respondent's quotation from *Kremer* (Respondent's Brief, p. 6), seeming to equate the previous state court judgment's preclusion of any other state court claims based upon the "same grievance" with the preclusion of any relitigation of the "same question" in federal court, is taken out of context. The immediately preceding sentence of this Court's decision makes clear that the "same question" to which it there referred was the factual one whether "the discharge and failure

to rehire Kremer were . . . the product of the discrimination that he had alleged" (*Kremer* v. *Chemical Construction Corp.*, supra, 456 U.S. at 466). This Court was there emphasizing that, because the New York courts were forbidden by the New York anti-employment discrimination statute to hear any subsequent claim based upon the same grievance, the reviewing court's determination of the aforesaid key factual issue was final. *Kremer* was, in short, an issue preclusion, not a claim preclusion, case.

Second, *Thomas* emphasizes, by analogy, the critical importance of the factor of exclusive federal jurisdiction in this case. Justice Stevens' plurality opinion squarely relied upon § 26(1)(c) of the *Restatement (Second) of Judgments*—the provision upon which the petitioners have relied (see Principal Brief, pp. 23-24)—in support of its holding that the Virginia Industrial Commission's award of disability benefits to that claimant did not preclude a subsequent additional award to him for the same injury by the District of Columbia workman's compensation board *because the Virginia Commission was not authorized to apply the District of Columbia's statute*. The Virginia Commission's award would not have been accorded such external claim-preclusive effect under the claim preclusion rules of Virginia (*Thomas*, supra, 448 U.S. at 265, n. 6).

However, a Virginia *court* could have applied the District of Columbia's statute under conflict of laws principles. Therefore, as all members of this Court agreed, a Virginia court judgment in the lesser amount authorized by the Virginia statute would have precluded the subsequent award in the District of Columbia (id., at 281-82; compare *Kremer*, supra, and *McDonald* v. *City of West Branch, Michigan*, ____ U.S. ____, 80 L.Ed.2d 302, 104 S.Ct. 1799 (1984)).

Here, by contrast, the Illinois courts could not possibly have applied the federal antitrust laws in the petitioners' previous suits. Indeed, any attempt by the Illinois *legislature* to

declare the final judgment of an Illinois antitrust action to be preclusive of such an exclusively federal action would violate the supremacy clause of the United States Constitution. Thus, *Thomas*'s reference to the need to accord a state court's judgment the same preclusive effect elsewhere that it would have in the state in which it was pronounced (*Thomas*, supra, 448 U.S. at 270) must be understood as assuming that the courts of that state could pass judgment on the matters precluded. In any event, it says nothing about what preclusive effect the previous judgments here concerned could have with respect to the present exclusively federal claim *within* the State of Illinois.

The determination of the claim-preclusive effect, if any, of state court judgments upon subsequent exclusively federal claims must not begin with the false assumption that there is no difference between those claims which could and those which could not have been brought in the state courts. Such an approach assumes the answer to the problem even though the assumption itself is plainly illogical. No court has ever regarded successive state and exclusively federal claims as identical merely because they might happen to be "based upon the same grievance." To the contrary, all courts have recognized that the various grants of exclusive federal jurisdiction must be accorded at least *some* significance in determining whether a prior state court judgment may preclude such claims by claim preclusion. See, e.g., *Brown* v. *Felsen*, 442 U.S. 127 (1979); compare even the controversial inter-system "identity" analysis of *Nash*, *Derish* and the Plurality Opinion, which would be totally irrelevant on the respondent's assumption.

The respondent makes another false assumption that underlies the false assumption just considered. This is the misconception that the federal courts may determine the significance of the factor of exclusive federal jurisdiction for the states, without regard to state claim preclusion rules and without need of any implied exception to section 1738 in order to warrant such federal determinations of the preclusive effect

of state court judgments. The respondent's approach here stands *Kremer* on its head by assuming a result that would almost always conflict with state claim preclusion rules (see Part III, infra). At the least, it takes no account of the obvious possibility that a state's claim preclusion rules might *not* require the preclusion of an exclusively federal claim by means of a prior state court judgment even though those same rules might nevertheless require the preclusion of any possible state court claims between the same parties that were based upon the same overall set of facts.

The respondent would have this Court impose upon the states a rule of the automatic identity of state law and exclusively federal claims for claim preclusion purposes, but no such federal rule is consistent with *Kremer*. As this Court there held, in the absence of a "partial repeal," the Full Faith and Credit Statute

> "... does not allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." (*Kremer* v. *Chemical Construction Corp.*, supra, 456 U.S. 461, 481-82)

Thus, subject to the narrow "partial repeal" exception just mentioned (and to due process constraints incorporated in the requirement of a full and fair opportunity to litigate (id., at 480-81)), Illinois' claim preclusion rules must be applied *to this particular claim*, not to some other claim that the petitioners might otherwise have sought to bring in the Illinois courts.

Certainly, as the dissents below explained (see App. A-51 to 52), federal judges can apply the rules of Illinois' preclusion law to exclusively federal claims; those rules are not inherently inapplicable merely because the Illinois courts are not themselves jurisdictionally competent to make such determinations.

III. THE RESPONDENT'S INVERSION OF THE LONG-SETTLED "COULD HAVE BEEN RAISED" LIMITATION OF ILLINOIS' CLAIM PRECLUSION LAW SO AS TO MEAN IN THIS CASE "COULD HAVE BEEN RAISED SOMEWHERE ELSE" IS SO ILLOGICAL AND INSUPPORTABLE THAT NO REMAND IS REQUIRED FOR ITS REJECTION.

The weakness of the respondent's analysis of the "could have been raised" requirement of Illinois' preclusion law (the existence of which it concedes: see Respondent's Brief, pp. 10-11) is underscored by its contention that the *petitioners* have distorted the position of the Illinois Supreme Court in *Spiller* v. *Continental Tube Co.*, 95 Ill.2d 423, 447 N.E.2d 834 (1983), which is that Court's most recent major statement of the *res judicata* doctrine. The respondent takes the petitioners to task as follows:

> "*Spiller* does not qualify the language 'questions which [c]ould have been raised *or determined*' by limiting it to questions which could have been raised in the prior lawsuit. Instead it states 'all questions.'" (Respondent's Brief, p.11)

Thus, as the respondent views Illinois' claim preclusion law (and, indeed, the federal common law of claim preclusion, which is said to be "comparable": id., p. 34), a plaintiff in the Illinois courts *necessarily* "waives," as against the defendant, any other claims that "could have been raised or determined" *anywhere else in the world*, even though not in Illinois, provided only that such other claims arise from the same basic factual setting.

This is an unheard-of misconstruction of Illinois' long-settled "could have been raised" requirement of claim preclusion. When the Illinois Supreme Court said that "[t]he principle [of claim preclusion] extends not only to questions which were actually litigated but also to all questions which

could have been raised or determined" (*Spiller*, supra, 447 N.E.2d at 838), it could only have been referring to the "actual litigation" that had previously occurred in state court. For, in determining that res judicata did not bar the later claim, the Illinois Supreme Court looked to the actual previous action in the Illinois courts, noting that:

> "Plaintiffs in their original action sued Spiller and Spiller, Inc., to recover on the promissory notes. Continental was not a defendant, and the litigation did not involve its alleged liability on those notes pursuant to the sales contract, the validity of the contract or plaintiffs' alleged breach of contract." (id., at 839) (emphasis supplied)

This quotation alone suffices to disprove the "could have been raised somewhere in the world" hypothesis.

Any remaining doubt is removed by the fact that each of the three precedents cited by the Illinois Supreme Court in support of its restatement of the traditional "could have been raised or determined" limitation had included the words "in the original action" or other words to exactly the same effect in its own statement of the same long-accepted requirement. *People* v. *Bone*, 82 Ill.2d 282, 412 N.E.2d 444, 446 (1980); *Hughey* v. *Industrial Com'n*, 76 Ill.2d 577, 394 N.E.2d 1164, 1166 (1979); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1877); see also all other authorities cited in Principal Brief, p. 16 at n. 3 and p. 32 at n. 16. No decision of any court, state or federal, has ever construed the long-settled "could have been raised" requirement in the manner now urged by the respondent.

Furthermore, the respondent has offered no authority or even argument for the existence of a "waiver" rule in Illinois, independent of the supposed "could have been raised somewhere else in the world" rule, such that claims which could *not* have been brought in a prior Illinois court action might somehow be deemed to have been "waived" by the bringing of that action (but see Principal Brief, p. 17 at n. 5).

Solely because of *Hagee* v. *City of Evanston*, 729 F.2d 510 (7th Cir. 1984) (but see Principal Brief, p. 17 at n. 4), the

petitioners acknowledge that there is now a sufficient conflict of authority on the Illinois definition of a common "cause of action" that it would be inappropriate for this Court itself to decide that particular state claim preclusion issue. However, no remand (or certification to the Illinois Supreme Court) is necessary, both because the other two above-mentioned rules of Illinois' claim preclusion law are so clearly in the petitioners' favor and also because the overriding federal rule of *nonpreclusion* requires the same result.

IV. IN THE ABSENCE OF ANY ACCEPTED BASIS FOR CLAIM PRECLUSION, THE RESPONDENT RELIES UPON A THEORY OF "WAIVER," BUT NO COURT HAS SUGGESTED SUCH A THEORY WHERE THE ACTUAL CLAIMS ARE NOT FOUND TO BE IDENTICAL.

The respondent seeks by means of its "waiver" theory to distinguish the many decisions that support the existence of an overriding federal rule of the *nonpreclusion* of exclusively federal claims by *claim preclusion* as the result of prior state court judgments. However, contrary to the respondent's mystifying account of "role reversals" and concurrent federal and state court actions serving as proof of the plaintiff's intention *not* to "waive" exclusively federal claims, the federal courts have wisely adhered to the "accepted principles of res judicata."

First, the respondent dwells upon the "role reversal" in a number of the leading cases such as *Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2d Cir. 1955), emphasizing that in these cases the federal antitrust plaintiff had previously been the defendant in state court and had therefore not been able to choose the federal forum. In fact, this aspect of the "waiver" theory all but destroys it. *Lyons* is so powerfully supportive of the rule of nonpreclusion *because of* this role reversal, which permitted the federal antitrust plaintiffs to litigate their federal claim in state court as an affirmative

defense—as they did and lost. Despite that fact, Judge Learned Hand placed controlling emphasis upon the need for an "untrammeled jurisdiction of the federal courts" (id., at 189). Similarly, in *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 274 (7th Cir. 1981), the federal antitrust plaintiff was held not to be precluded by the previous Illinois court judgment against it as a defendant even though, in that previous action, it had raised the affirmative defenses of Sherman Act illegality and illegality under the Illinois Antitrust Act, suffered a dismissal of the state antitrust defense but been allowed to maintain its federal antitrust defense, and yet elected to withdraw that defense (see *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 627-28 at n. 2 (1977)).

Cases such as *Lyons* and *Lektro-Vend* were singled out by Professor Currie as deserving of claim preclusion even though, as he recognized, the claim preclusion by a state court judgment of the exclusively federal claim of a party that had been the *plaintiff* in state court would be illogical and contradictory of all accepted doctrine.[7] Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 347-48 (1978).

The other half of the respondent's attempted "waiver" explanation of the array of major authorities against it is the contention that, in all or at least most of the cases where there had been no "role reversal," the plaintiffs had proven their "clear intent not to waive access to the federal forum" (Respondent's Brief, p. 18) by suing in both state and federal court at the same time. This interpretation ignores the fact that none of these other decisions assigned any such favorable significance to the factor of concurrent litigation. Far from *opposing* claim preclusion (least of all, on the abstruse theory of "disproof of waiver"), that factor caused the need for an immediate determination whether the state court action could possibly preclude the exclusively federal action by claim preclusion, and each court, in turn, determined that it could not.

[7] *United States* v. *Radio Corp. of America*, 358 U.S. 334, 352 (1959); *Restatement (Second) of Judgments*, § 26(1)(c) (1982); *Restatement of Judgments*, §§ 62(k), 71(c) (1942).

Johnson Steel Street Rail Co. v. *Wharton*, 152 U.S. 252 (1894), is not to the contrary. The respondent's citation of that decision for the proposition that "*res judicata*'s reach is not confined to courts of concurrent jurisdiction but extends to foreign judgments" (Respondent's Brief, p. 33) ignores the fact that *Johnson* dealt with the issue preclusion, not the claim preclusion, branch of the res judicata doctrine. Compare *Lessee of Parrish* v. *Ferris*, 67 U.S. 606 (1863).

The respondent's additional attempt to distinguish *Brown* v. *Felsen*, 442 U.S. 127 (1979), on the basis of the express congressional grant of exclusive federal jurisdiction over questions of bankruptcy dischargeability, in contrast to the implicit grant of such jurisdiction over federal antitrust actions, fares still worse. As demonstrated by the Principal Brief, this Court's repeated holdings that the federal courts have exclusive jurisdiction over federal antitrust actions, despite the absence of an unequivocal statutory grant, necessarily imply that such federal actions are "clear[ly] incompatib[le] [with] state-court jurisdiction" within the meaning of *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 452 U.S. 473, 478 (1981), *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 507-08 (1962), and *Claflin* v. *Houseman*, 93 U.S. 130, 137 (1876). Thus, the overriding federal rule of nonpreclusion is *particularly* appropriate for them (see Principal Brief, p. 20; compare id., pp. 26-28).

Not only is there no case law authority for the respondent's "waiver" theory as applied to claims that were beyond the subject matter jurisdiction of the first tribunal, but *Kremer* itself implicitly rejects that approach. As noted by Judge Sarokin in *Wood* v. *Garden State Paper Co., Inc.*, 577 F.Supp. 632 (D.N.J. 1983):

> "No plaintiff who has been denied an opportunity to fully and fairly litigate his or her claim in one forum is precluded solely because he or she could have chosen a different forum from the outset .... This conclusion derives implicit support from *Kremer:* the New York proce-

> dures there upheld also included the right to proceed in state court . . [;] however, the [Supreme Court] notably omitted all mention of it as a factor in favor of binding the plaintiff by those procedures." (id., at 636)

Here, too, the petitioners were denied the opportunity to "fully and fairly litigate" their federal antitrust claim in their previous state court actions, by reason of those courts' lack of subject matter jurisdiction over that claim. The same holds true for all cases in which a prior state court judgment is said to preclude by claim preclusion a subsequent exclusively federal claim. Thus, whether by "partial repeal" of section 1738 or by *fundamental fairness limitation of it* (*Kremer* v. *Chemical Construction Corporation*, supra, 456 U.S. 461, 480-81), an overriding federal rule of nonpreclusion does apply in all such cases, to the exclusion of the respondent's theory of "waiver."

The respondent must ultimately resort to the supposed "unfairness" of its having been sued in federal court for exclusively federal antitrust violations (though well within the statute of limitations period: and see *Perma Muffler* v. *Internal Parts Corporation*, 393 U.S. 134 (1968)) as the chief justification for its "waiver" theory. This was also the rationale of Judge Flaum, who candidly acknowledged the lack of any precedent for it (see App. A-32). However, the claim preclusion doctrine is also often "unfair" to plaintiffs (*Brown* v. *Felsen*, supra, 442 U.S. at 132) and would be particularly so if it applied to this case—as it does not. That doctrine concerns the finality of the "matter adjudged" (Am. Jur. 2d, *Judgments*, §§ 394, 420), and the "matter adjudged" in the state courts simply was not the same as the petitioners' present exclusively federal antitrust claim. Given that fact, *Federated Department Stores* v. *Moitie*, 452 U.S. 394, 398-99 (1981), forbids the respondent's and Judge Flaum's so-called "equitable" expansion of the "accepted principles of res judicata."

Those traditional principles not only protect against the extreme unfairness of precluding claims that could not possibly

have been brought in the prior action (compare *Wood*, supra, with *Nilsen* v. *City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983) (in banc)); they also give the proper weight to another principle that former Justice Stewart wisely recognized as being "fundamental to our legal system, [the principle] that parties, not judges, choose the forum" (App. B-27). The respondent's theory frontally conflicts with the latter "fundamental" principle by in effect *compelling plaintiffs with both state law and exclusively federal claims to bring their state law claims in federal court* (see generally pp. 35-38 of the Principal Brief).

Like Judge Flaum, the respondent has attempted to cope with the fatal comity, federalism, constitutional and efficiency objections to the "waiver" theory by recognizing a special exception for cases in which the exclusively federal action is brought before the state court action has ended (Respondent's Brief, pp. 19-20).[8] However, in response to the petitioners' critique that the established mandatory pendent jurisdiction rule would leave any state court claims in this context subject to preclusion if the concurrent exclusively federal claim were decided first, the respondent has proposed still another innovation. It asserts that in *Migra* v. *Warren City School Dist. Bd. of Ed.*, supra, 104 S. Ct. 892 at 898 n. 7 (1984):

> "[T]his court noted that a plaintiff can preserve access to the federal forum if the federal suit is filed before or concurrently with the state action *and* the state court is informed that plaintiff intends to return to federal court to litigate its federal claims." (Respondent's Brief, p. 32)

This reading ignores the fact that this Court was there referring to the rare situation in which a plaintiff first seeks to

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[8] This exception would logically apply with respect to Dr. Marrese inasmuch as his state court suit was not dismissed until long after the institution of the present exclusively federal action (but see Judge Flaum's vague "expectation of dismissal" exception to this exception at App. A-25, n.1).

bring a nonexclusive federal claim in federal court but the latter abstains from deciding it and remits that party to a state court proceeding. In those circumstances, if the state court plaintiff (a) advises the state court of its refusal to litigate any aspect of the federal claim in that forum and (b) resolutely persists in that refusal *until the conclusion of the state court action*, then the ordinary claim-preclusive effect of that final state court judgment will not prevent the plaintiff's return to federal court. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), cited in *Migra*, supra.

The policy objections to which the respondent is attempting to respond arise from a plaintiff's coerced departure from *state* court, not federal court, and not because of any undesirable new principle of abstention but rather because few, if any, plaintiffs faced with the "waiver" of their exclusively federal claims if they bring their state law claims in the state court will choose to proceed there. The concurrent-actions requirement, too, places an intolerable burden upon the right of plaintiffs (including state and local governments) to bring their state law claims in the courts of their own state. Moreover, the respondent's attempt to alleviate one small part of that burden by reading *Migra* to permit a general "reservation of rights" threatens to undermine both the first judgment and the mandatory pendent jurisdiction rules of claim preclusion, which are themselves among the most important judicial means of avoiding the obvious waste of multiple, concurrent state and federal litigations. Floyd, *CONTROL OF BREAK-AWAY STATE ANTITRUST LITIGATION: AN ISSUE OF FEDERALISM*, 35 Hastings L. J. 1 (1983).

Finally, although *Nash* did suggest the possibility of "waiver" as an additional ground for its holding of claim preclusion, it did so only in cases where the second suit was, as there, "identical with the earlier action." *Nash Cty. Bd. of Ed.* v. *Biltmore Co.*, supra, 640 F.2d at 493. Conceivably, in those extreme circumstances, the overriding federal rule of nonpreclusion should not apply, in which case the preclusion analysis would have to be based entirely upon the application of state preclusion principles (see Principal Brief, p. 21 at n.11 and related text). However, as the respondent has virtually conceded, *Nash* is not this case.

V. THE RESPONDENT'S FINAL ASSERTION THAT ANY "OPPORTUNITY" TO SEEK ANTITRUST TREBLE DAMAGES IN STATE COURT WILL SUBSTITUTE FOR AN EXCLUSIVELY FEDERAL ANTITRUST ACTION MERELY CONFIRMS THE ABSENCE OF ANY COMMON CAUSE OF ACTION OR WAIVER IN THIS CASE.

The respondent's only response to the petitioners' detailed arguments concerning the lack of "identity" between their previous state court common law actions and their present exclusively federal antitrust action (Principal Brief, Parts III and IV) is the fallacious generalization that "Illinois antitrust laws are virtually identical to their federal counterparts" (Respondent's Brief, p. 36), which is coupled with the explanation that the petitioners had at least some "opportunity" to "seek complete antitrust relief (i.e., treble damages and injunctive relief)" in the Illinois courts (id.).

However, any "identity" analysis in this context must begin with a comparison of the relevant possible *standards of liability*, not the maximum conceivably attainable recovery if liability is shown. *Derish* v. *San Mateo-Burlingame Bd. of Realtors*, supra, 724 F.2d 1347; compare *Magnolia Petroleum Company* v. *Hunt*, 320 U.S. 430, 444 (1943); *Troxell* v. *Delaware, L. & W. R. Co.*, 227 U.S. 434 (1913). As demonstrated at pages 40-43 of the Principal Brief, major *possible* differences in the respective required proofs of liability abound here.

Furthermore, under the Illinois statute, even if liability is shown in a case of this nature, a further showing of "willful" violation is required for the possible recovery of any amount of

damages in excess of the proven actual damages. Even then, an award of any such additional damages ("up to" the maximum theoretical amount of treble damages) rests entirely in the discretion of the trial court (Principal Brief, p. 43). Thus, the Illinois statute does not provide a *right* to treble damages. Yet, that right is itself so important that the federal courts have repeatedly held that a state antitrust cause of action and a federal antitrust cause of action can never be the same if the state statute does not provide that right. See, e.g., *Derish; Nash; Hayes* v. *Solomon*, 597 F.2d 958 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *New England Liquor Sales Co., Inc.* v. *General Beverage Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,798 (D. Mass. 1982).

In conclusion, the respondent's "some opportunity" concept is an amalgam of waiver and claim preclusion doctrine—in the absence of any basis for the application of either.

At the same time, this analytical confusion evidences the respondent's concern about the radical policy implications of an unmitigated "waiver" analysis whereby all prior state court actions based upon the same general set of facts as subsequent exclusively federal actions would *ipso facto* be deemed to "waive" the latter actions i.e., the relevant exclusively federal *rights*. Judge Flaum made this erroneous assumption and was, therefore, unconcerned with whether Illinois even had an antitrust statute, much less, one that was in any sense "identical" to the federal statutes. However, the Plurality Opinion correctly assumed that no waiver could possibly arise in the absence of *at least* the "material identity" of the state and federal antitrust statutes and the actual prior prosecution of a state antitrust action. Therefore, it correctly limited its analysis of the certified question to claim preclusion even though it incorrectly found "identity" where there was none and otherwise misapplied the sound, traditional claim preclusion doctrine.

VI. THE RESPONDENT CONCEDES THAT THE SEVENTH CIRCUIT'S CRIMINAL CONTEMPT DECISION MUST BE REVERSED IF ITS CLAIM PRECLUSION DECISION IS ALSO REVERSED.

The respondent has not even attempted to dispute the petitioners' analysis that, but for Judge Bauer's limited concurrence in the "result" of claim preclusion (see Principal Brief, p. 7), his approval of trial courts' discretion "in the strong sense" as to discovery matters (see Supplemental Brief, p. 3) would also have applied to District Judge Shadur's protective order. The absolute dependence of the Seventh Circuit's criminal contempt decision upon its claim preclusion decision is obvious, and the plurality's improper remarks about the First Amendment, under its now-abandoned "mistake" standard of review, should be rejected as plain error.

CONCLUSION

Therefore, the petitioners again respectfully submit that the Seventh Circuit's claim preclusion decision and criminal contempt decision in the case now before this Court should be reversed.

Respectfully submitted,

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